Supreme Court, U. S.
FILED
JAN 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6123

JOHNSON WASHINGTON, JR.,

Petitioner,

-v.-

STATE OF LOUISIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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No. 75-

JOHNSON WASHINGTON, JR.,

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STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered on October 1, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at __ La.__, 321 So.2d 763 (1975), and is set out in Appendix A hereto, pp. 1a-6a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on October 1, 1975, and is set out in Appendix A hereto. On December 18, 1975, Mr. Justice Powell entered an order extending the time in which to file a petition for a writ of certiorari in this case to and including January 29, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Louisiana violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the exclusion for cause of fourteen veniremen on the grounds of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

3. Whether the introduction at petitioner's capital trial of his written confession and of a pistol which petitioner retrieved for the police violated his Fifth Amendment right against compulsory self incrimination when this statement and physical evidence were obtained as a direct consequence of an earlier coerced oral confession which was not introduced?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following provisions of the Revised Statutes Annotated and Code of Criminal Procedure of Louisiana.

La. Rev. Stat. Ann. §14:29 (1974):

> "Homicide; general provisions. Homicide is the killing of a human being by the act, procurement or culpable omission of another. Criminal homicide is of four grades:
>
> (1) First degree murder
> (2) Second degree murder
> (3) Manslaughter
> (4) Negligent homicide.
>
> No liability for criminal homicide shall attach unless the injured party dies within a year after the injury is inflicted."

La. Rev. Stat. Ann. §14:30 (1974):

> "First degree murder. First degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
>
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
>
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
>
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;
>
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
>
> For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.

Whoever commits the crime of first degree murder shall be punished by death." 1/

La. Rev. Stat. Ann. §14:30.1 (1974):

"Second degree murder. Second degree murder is the killing of a human being:

(1)When the offender has a specific intent to kill or to inflict great bodily harm; or

(2)When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty

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1/ On July 17, 1975, the Louisiana legislature enacted Act. 327 (H.B. No. 320) which provides:

"Section 1. Section 30 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

§ 30. First degree murder

First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and he is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape, aggravated burglary, or armed robbery; or

* * *

For the purposes of Paragraph (2) hereof, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney, or district attorneys' investigator.

Whoever commits the crime of first degree murder shall be punished by death.

Section 2. All laws or parts of laws in conflict herewith are hereby repealed."

Louisiana Session Laws 1975 (West's Louisiana Session Law Service 1975 at 570-571).

years." 2/

La. Rev. Stat. Ann. §14:31 (1974):

> "Manslaughter. Manslaughter is:
> (1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood's would have cooled, at the time the offense was committed; or
> (2) A homicide committed, without any intent to cause death or great bodily harm.
> (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or
> (b) When the offender is resisting lawful

2/ On July 17, 1975, the Louisiana Legislature enacted Act 380 (H.B. No. 311) which provides:

> "Section 1. Section 30.1 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:
> § 30.1 Second degree murder
> Second degree murder is the killing of a human being:
> (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
> (2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.
> Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation, or suspension of sentence for a period of forty years.
> Section 2. All laws or parts of laws in conflict herewith are hereby repealed."

Louisiana Session Laws 1975 (West's Louisiana Session Law Service 1975 at 665).

arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years."

La. Rev. Stat. Ann. §15:567 (1967):

"Conditions precedent to execution; warrant of governor. No person sentenced to death shall be executed until a certified copy of the indictment, verdict and sentence shall have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

La. Rev. Stat. Ann. §15:568 (1975 supp.):

"Execution of death sentence; prior confinement of offender. The director of the Department of Corrections, or a competent person selected by him, shall execute the offender in conformity with the death warrant issued in the case. Until the time of his execution, the Department of Corrections shall incarcerate the offender in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution."

La Rev. Stat. Ann. §15:569 (1967):

"Place for execution of death sentence; manner of execution. Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuation of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room."

La. Rev. Stat. Ann. §15:570 (1974 supp.):

"Officials and witnesses present at execution; minors excluded. Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the

coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall have not been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution."

La. Code Crim. Proc. Ann. art. 598 (1975 supp.):

"Effect of verdict of lesser offense. When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial."

La. Code Crim. Proc. Ann. art. 803 (1967):

"Same [General charge; scope]; charge as to included minor offenses and plea of insanity. When a count in an indictment sets out an offense which includes other offenses of which the accused could be found guilty under the provisions of Article 814 or 815, the court shall charge the jury as to the law applicable to each offense . . . ."

La. Code Crim. Proc. Ann. art. 804 (1967):

"Same; charge as to presumption of innocence, reasonable doubt, and several grades of offense . . . . (B) When there are several grades of an offense contained in a single count, the court shall charge the jury as to each grade of which the defendant could be found guilty."

La. Code Crim. Proc. Ann. art. 809 (1967):

"Judge to give jury written list of responsive verdicts. After charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation."

La. Code Crim. Proc. Ann. art. 814 (1975 supp.):

> "Responsive verdicts; in particular. A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:
>
> 1. First Degree Murder:
> Guilty.
> Guilty of second degree murder.
> Guilty of manslaughter.
> Not guilty . . . ."

La. Code Crim. Proc. Ann. art. 817 (1975 supp.):

> "Qualifying verdicts. Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Louisiana, entered on October 1, 1975, affirming petitioner's conviction and death sentence. Petitioner, Johnson Washington, Jr., a twenty-year-old black man, was convicted of the first degree murder of a white St. Charles Parish deputy sheriff, James A. Arterbury, and was sentenced to death on February 4, 1974, in the Twenty Ninth Judicial District Court, Parish of St. Charles, Louisiana.

During the late afternoon and early evening of July 4, 1973, a "record hop," T. 13,[3/] was being held at the Nitecap Lounge in Killona, Louisiana for the benefit of the Killona Snipers Softball

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3/ The transcript in this case is divided into a number of separately paginated sections. Hereinafter, reference to the 535 page trial transcript will be prefaced by "T." References to other sections of the transcript will be as follows: sanity hearing -- San. T.; change of venue hearing -- C.V.T.; motion to suppress hearing -- M.S.T.; jury selection -- J.S.T.; sentencing hearing -- Sent. T.

Club, T. 68. The admission price of fifty cents was being collected at the door by one Clarence Campbell. Ibid. About 8:00 p.m., petitioner and three of his relatives (his cousins, Rudolph Johnson and James Johnson, and his uncle, James Washington), arrived at the Lounge and, according to Campbell, attempted to enter without paying.[4/] T. 69. After a brief argument, Rudolph Johnson knocked the money box out of Campbell's hand, and petitioner charged Campbell with a coke bottle. In the ensuing melee (which caused considerable damage to the inside of the Lounge, T. 19), Campbell knocked both of his assailants down and physically threw them out of the Lounge. T. 70. The owner of the Lounge, Mrs. Lucille Roberts, testified that petitioner and Rudolph Johnson drew knives and began "switching" them at her and at Campbell, T. 14, 71, and threatened to "cut" them, T. 71. A loud argument then took place, and Rudolph Johnson declared finally that he was going home: "'But when I come back . . . I'm going to tear this motherfucker down . . . I'm going to burn it up.'" T. 14-15. Petitioner

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4/ Campbell testified that Rudolph Johnson paid him a dollar (it is unclear from the record whether Rudolph Johnson entered the Lounge at this point) and that petitioner then tried to enter the Lounge. Campbell stopped petitioner, and then petitioner and Rudolph Johnson conferred outside the Lounge. Rudolph Johnson then walked back to Campbell and demanded $4.50 in change and accused Campbell of cheating him. T. 69-70. The fight started at this point.

was present at this point, but he uttered no threats. T. 15.

Mrs. Roberts and Campbell went back inside the Lounge, and Mrs. Roberts telephoned the police "and told them to send help right away." T. 16. A short time later, Deputy Arterbury drove up in a marked St. Charles Parish sheriff's car. He was dressed in his uniform, was wearing a pistol, and was carrying either a pencil and pad, T. 18, or a flashlight, T. 82-A, in his hands when he entered the Lounge. Mrs. Roberts told him "'All I know it [the dispute] is over some change.'" T. 18. Campbell said he wanted "'these mens'" arrested because they "'tried to cut . . . [his] leg off,'" but Deputy Arterbury told him he would have to file a complaint with the Justice of the Peace, since he had only come to the Lounge to see "'if they doing anything wrong and don't want to abide by the law.'" T. 18-19. In that case, he added, "'I'll have to taken them to jail.'" T. 19.

By this time, a large and unruly crowd had gathered outside, which was "hollering and yelling and making a lot of noise." Ibid. Mrs. Roberts heard someone yell, "'Kill-kill that son-of-a-bitch [Deputy Arterbury] . . . I say kill him,'" and "'They ought to set that mother-fucker's [Mrs. Roberts' Lounge] on fire . . . and burn that mother-fucker down . . . Cause she ain't got no goddam business to call that policeman.'" T. 20. Deputy Arterbury walked back out to his patrol car and took his shotgun from the trunk, pumping a shell into the

chamber, T. 124. He radioed headquarters that "he might need assistance," T. 147, and urged the deputy who responded to the call to "'Hurry it up,'" T. 148.

Deputy Arterbury then turned to face the crowd, his shotgun pointed up into the air. He asked where "Pop Johnson" (petitioner's nickname) was, and petitioner's father, Johnson Washington, Sr., demanded from the crowd, "'What do you want with Pop Johnson?'" T. 89. The deputy repeated his question, and petitioner's father repeated his response. Ibid. At this point, Mrs. Roberts' daughter ran into the Lounge and told her mother that it "'looks like they are going to try to kill the policeman.'" T. 20. Mrs. Roberts phoned the sheriff's office to "'Come as fast as you can . . . The officer is up here in trouble,'" and then she went outside with a "pool stick" in her hand. Ibid. She heard Deputy Arterbury tell the crowd, "'I didn't come here for no trouble,'" ibid., and another witness heard him declare that "he know everybody been drinking, that it was the 4th of July, know they'd been drinking and doing all that stuff, just came over there to try to cool everything down." T. 126.

Mrs. Roberts told the deputy to come into her yard for safety, but as he crossed a shallow ditch, the crowd ("a whole lot of men, women, everybody screaming," T. 127) surged around him, and petitioner's father grabbed the shotgun and attempted to wrest it from his grasp. The people nearest the deputy (a group which included petitioner, Rudolph Johnson, and James Washington) also grabbed the shotgun, and it went off while

pointed in the air. T. 22. Then, according to petitioner's twelve-year-old cousin, Albert Washington, petitioner pulled Arterbury's .357 magnum pistol from its holster and shot the deputy once in the back with it. 5/

The crowd scattered. Another cousin of petitioner's Ronald Johnson, 6/ testified that he was in the crowd around the deputy when the shooting occurred (he heard only one shot, however, T. 128). T. 124-120. As he "took off and started running," T. 130, however, petitioner handed him a pistol: "[h]e just told me to take it, take it and put it somewhere." T. 131. Ronald Johnson hid the pistol in some grass near Clarence Campbell's house, which was a short distance away from the scene of the shooting. Ibid. Later that evening, Ronald Johnson heard his brother James Johnson ask petitioner "what had happened, who he had shot," ibid., and petitioner "said that he had did it . . . . Shot that deputy." T. 132. Petitioner then had Ronald Johnson go back and retrieve the pistol and said they must "try to find a place and hide it, throw it away somewhere." T. 133. As the three drove around

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5/ Albert Washington was the only person who testified that he actually saw petitioner shoot Deputy Arterbury. Although it was "dark out there," "they had a light out there," and he was able to see petitioner behind Deputy Arterbury, in the midst of a crowd of about twenty people. T. 108. Albert Washington also testified that he heard a total of four shots, T. 111, in all. All the rest of the State's evidence tended to establish, however, that only two shots (one from the shotgun, one from the pistol) had been fired. T. 335, 355.

6/ Ronald Johnson was originally charged with the murder of Deputy Arterbury, T. 135, but he was "booked but never billed [i.e. indicted]", T. 118, since he was granted immunity, ibid.

looking for Rudolph Johnson (Ronald's and James' brother), petitioner threw the pistol into the Waterford Canal from a wooden bridge near the Killona power plant. T. 134.

When the deputy who had been sent to Arterbury's aid arrived on the scene about 8:40 p.m. and found Arterbury shot, 7/ he radioed headquarters to "get the whole force out", T. 148, and a massive night-long manhunt followed in which a number of suspects in the Arterbury shooting were arrested and taken to the sheriff's office for questioning. One detective recalled that "[j]ust about everybody was out that night." T. 294.

Detective V.J. St. Pierre arrived at the Nitecap Lounge about 9:00 p.m. He took several eye witnesses to the police station, and as a result of interrogations there, he proceeded at about 11:55 p.m. to petitioner's father's house (where petitioner also lived) with several other officers to arrest petitioner and his father. Detective St. Pierre saw petitioner sitting in a car and as deputies approached the car with their pistols drawn, St. Pierre told petitioner he was under arrest for murder. M.S.T. 86. Petitioner offered "resistance," ibid., and had to be pulled out of the car, whereupon he was handcuffed and had his "Miranda warnings," ibid., read to him by St. Pierre. The detective asked him, "'Do you understand these rights?'" and petitioner replied, "'Sure.'" T. 232.

7/ An ambulance arrived for Deputy Arterbury about 30 to 45 minutes later. T. 159. On the way to the hospital, it had an accident, and slid into the ditch, pitching to the floor the stretcher on which the still-conscious deputy was lying. T.164. He died in the hospital emergency room later that evening. An autopsy revealed several bruises and superficial cuts due to the ambulance accident, but in the pathologist's opinion, Deputy Arterbury died from blood loss due to the gun shot wound in his back. T. 214-216. Because of powder deposits around the wound, the pathologist was of the opinion that the gun had been fired at a distance of no more than 18 inches from the deputy's back. T. 205.

The record is somewhat unclear concerning events of the next eight hours. Petitioner and his father were taken to the sheriff's office, and Rudolph Johnson, James Johnson, and James Washington were also arrested sometime during the period. M.S.T. 4, 69. There was contradictory testimony as to whether petitioner was physically abused.[8/] According to

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8/ Deputy Coleman, M.S.T. 11, 16, Deputy Laque (who was in charge of the St. Charles Parish jail), M.S.T. 27, 28, Detective St. Pierre, M.S.T. 75, T. 300, Deputy Kimble, M.S.T. 99, and Deputy Walker, T. 241, all testified that they saw no one strike or physically mistreat petitioner. Deputy Zeringue photographed petitioner as part of the booking process shortly after his arrest, M.S.T. 22-23; petitioner appeared "normal," M.S.T. 25, to him and he did not notice any marks or bruises on petitioner, M.S.T. 23. Dr. Wilson Couch examined petitioner on August 17,1973, six weeks after the arrest, M.S.T. 43,because petitioner had complained of the "recurrence of headaches and difficulty sleeping." M.S.T. 42. According to Dr. Couch, petitioner did not "show signs of abuse at the time." M.S.T. 43. According to petitioner, however, at the time of his arrest, while his hands were handcuffed behind him, he was hit from behind by a police night stick,M.S.T. 38, and:

> "Down here in the courthouse office and they started hitting on me and beating me, hitting me in my private [sic] and everything, kicking me. Hitting me side the head with a flashlight. Hitting me in my back with a stick . . . . [T]hey kept me up all night beating on me and beating on me and then two of them came and took me to my cell and they handcuffed me and kicked me in my stomach and cut my wind and I fell down side the floor and they kicked me side my temple."

M.S.T. 39-40. Petitioner's father, Johnson Washington, Sr., testified that the police kept "whipping us [the suspects being interrogated] and shoving us around," M.S.T. 70, throughout the night following the arrests and that he saw some deputies "hit his [petitioner's] head up side the wall," M.S.T. 71. Other defense witnesses gave similar testimony. Bernie Johnson, the 16 year old brother of James Johnson, testified that he was beaten by deputies when he was arrested for interrogation on the night of July 4, 1973. T. 373. Mrs. Pricilla Stipes, petitioner's aunt, testified that she saw the police beat Johnson Washington, Sr., when they arrested him, T. 394, and that when she went to the police station, she saw the deputies beating petitioner, T. 395. She said that she protested to Deputy Coleman who told the other deputies to "'Lay off them,'" T. 395-396. Roland Smith, Jr., testified that the deputies "[p]assed

the jailer, petitioner spent part of the night alone in his cell, M.S.T. 27. It is clear, however, that petitioner was interrogated at various times throughout the night. Deputy Howard Walker recalled seeing petitioner in the booking room with a number of deputies ("They had a lot of deputies in the courthouse . . . . Almost all the deputies on the police force was out that night,") T. 247. Deputy Nelson Coleman, the only black deputy sheriff in the St. Charles Parish sheriff's office, M.S.T. 13, remembered that at least once that night he saw petitioner being questioned by "several" deputies, M.S.T. 16: "[t]hey had just quite a few people in there," T. 308. Petitioner's father testified that the police kept asking "'Who shot? Who shot?'" M.S.T. 70. At some point during the early morning hours, petitioner made an oral confession to Deputy Coleman (the substance of this confession and the circumstances under which it was given are unclear, since the State elected not to enter

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8/ cont'd.

a few licks on him [Johnson Washington, Sr.] when they were putting him in the car" after his arrest. T. 409. Sheldon Cannon testified that the police beat Johnson Washington, Sr., when they arrested him, T. 412, and Mrs. Waldorlee White saw "[t]he deputies hitting Washington," T. 415, at the time of the arrest. Petitioner's mother, Mrs. Hazel Washington, testified to seeing her husband and son physically abused at the time of their arrest, and she said that "the next morning," she went to the jail and "heard my son [petitioner] screaming and hollering up on the third floor." T. 435.

the confession at trial, T. 260)[9] admitting that he shot Deputy Arterbury and threw the pistol into the canal. Deputy Coleman sent for petitioner because the other deputies "told me that on the record it had to be Rudolph Johnson . . . . or 'Pops' . . ." M.S.T. 17 (both sets of dots appear in transcript). Also, Deputy Coleman had interrogated petitioner's uncle, James Washington, who had told the deputy "'it had to be one of . . . [my] nephews'" who shot Deputy Arterbury. M.S.T. 5. When there was some delay in bringing petitioner from his cell, Coleman went there to

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9/ Before Deputy Coleman testified at petitioner's trial, the trial court gave him the following cautionary instructions, outside the presence of the jury:

"[COURT]: Mr. Coleman, the purpose of asking this and talking to you out of the presence of the jury is that various types of testimony have been alluded to by the State with reference to your testimony. The court only wants to take the precaution of questioning you that there is no misunderstanding on your part that your testimony today is to refrain from any remarks relative to an oral confession. And that you are to answer the questions that counsel, both lawyers, put to you and limit yourself to answering only the questions they ask you. And not by way of inference or reference or any manner are you to refer to the confession which the defendant gave to you orally. Do you understand?

MR. COLEMAN: I understand.

COURT: I'm sure you do. You are to answer any question that any lawyer asks you. I mean, if they specifically ask you about an oral confession you can do nothing but answer their question. But what I'm warning you as - I don't want you to inadvertently refer to it when you are not asked to do that. OK?

MR. COLEMAN: OK."

question petitioner.[10] He later testified that petitioner was not "crying, but he looked to me like somewhat on the nervous side," and that petitioner was "[n]ot shaking, no, but you could that [sic], that he was upset in some way." M.S.T. 16. After petitioner's oral confession, Coleman and other deputies took him to the Waterford Canal where petitioner dove into the water[11]

10/ The testimony of this witness is somewhat confusing. On direct examination, at the motion to suppress hearing, he testified that during the night petitioner "kept saying he wanted to talk to me," M.S.T. 3, and that petitioner had said "'Mr. Nelson, I want to talk to you,'" M.S.T. 5, just before he confessed. Coleman added, however, that before the confession, "I sent a deputy up to get him to bring him [petitioner] down, to try to question him to try to find out did he kill the deputy." Ibid. On redirect examination, it became clear that Coleman, and not petitioner, had initiated the conversation that led to the confession:

> "THE COURT:
>
> Well, the court doesn't think he [Deputy Coleman] answered it. The question was, 'Did you go up there?' and the answer the state is looking for and the response I am looking for is, 'Did this man [petitioner] send for you and did you decide to go up and question him?[']' You never replied.
>
> Mr. Coleman:
>
> A: No, sir. He did not send for me and I did not intend to go up and question him. I said, 'I sent for him and when they did not come for so long I went to see why they were so long.[']
>
> THE COURT:
>
> Q: He did not ask to talk to you.
>
> A: No, sir. Not until after I went back there."

M.S.T. 18.

11/ Petitioner asserted, M.S.T. 41, and Deputy Coleman denied, M.S.T. 12, that a pistol had been fired at petitioner while he was in the water.

and recovered Deputy Arterbury's pistol. M.S.T. 10. A ballistics expert testified that the slug which was recovered at the Arterbury autopsy had been fired from this pistol. T. 359.

As soon as petitioner returned from the canal, he was interrogated by Detective St. Pierre in the presence of Deputy Coleman. Petitioner first signed a "St. Charles Parish Voluntary Statement" form, reciting that he had been advised of his constitutional right to remain silent and to have a lawyer present and had decided to make a voluntary statement. M.S.T. 76. He also signed a "Warning of Rights" waiver form, reciting that between 8:19 a.m. and 8:20 a.m., T. 298, he had been given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966).[12/] Detective St. Pierre testified that "After we make an arrest, we advise a person orally of his rights and then when we get them back to the courthouse we make them sign a written waiver of their rights." M.S.T. 77. Petitioner then gave a statement, which Detective St. Pierre reduced to writing and read back to petitioner. M.S.T. 79, 95. Petitioner looked over the two page statement and then signed it. M.S.T. 79. Detective St. Pierre recalled that at the time he gave the statement, petitioner "was frightened. He just killed a man . . . . I would say he was afraid of us." T. 296. While denying that he was "angry" as he questioned petitioner, the detective admitted that he had been "[v]ery upset" and that he had been "vehement" in his questioning. T. 300. Petitioner's statement, which was ruled voluntary and admissible

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12/ Detective St. Pierre stated that he wrote the word "yes" after each of the warnings, after petitioner said he understood the warning. M.S.T. 78.

by the trial court, T. 283, was introduced against petitioner at his trial, over objection:

> "8:20 A.M., July 5, 1973. Page No. 1. The following is a true statement of Johnson Washington, Jr., colored male, date of birth 5-30-53, born in New Orleans and now lives at Box 18, Killona, Louisiana. This statement is in reference to the murder of Deputy Allen Arterbury on the night of July 4, 1973.
>
> Rudolph Johnson and myself went to the Night Cap lounge to a record hop. I gave a dollar bill to Clarence Campbell and he gave me fifty cents back. Rudolph handed Clarence a $5.00 bill and went sit [sic] at a table. A little while later Rudolph asked Clarence for his change. Clarence refused to give him his change. I left and went to the bathroom. When I came back Rudolph and Clarence were fighting. Jimmy Scott and me tried to break the fight up.
>
> Randolph [sic] and I went outside. Lucille Roberts and her husband Carlton pulled a gun on us. Someone called the Sheriff's office while this was going on.
>
> Then the deputy arrived a short while later. He walked inside the bar to talk to somebody. He stayed inside for a while, then came out and asked who was 'Pop'. I said I was Pop. Then he said he would like to talk to you and Randolph [sic]. The deputy went back inside to get Campbell. I guess he wanted to talk to all three of us at one time.
>
> When the deputy came back outside he was by his self. I guess he couldn't find Campbell. He walked to the police car and opened the trunk and got out a shot gun. He walked on the side of the police car - wait - he walked on the side of the police unit with the shot gun in his hand. We were talking to each other. He told me he didn't want any trouble, he just wanted us to cool down. Then my daddy, Johnson Washington, Sr., James Washington, Rudolph Johnson, they all tried to take the gun away from the deputy. While my daddy, James, Rudolph -- while my daddy, James, Rudolph were fighting with the deputy, the shot gun went off in the air. Then I moved to the side of the deputy, pulled his gun out of his holster and shot him one time in the right back side. After the deputy fell to the ground everybody started running. James Johnson, Ronald Johnson and myself got into a car and drove to a canal in back of Waterford and threw the gun away. Then I went home, and the police came a short while after.
>
> I have read the above pages - page and a half of

statements and found it to be true to the best of my knowledge. I gave it with no physical threats or promises against me, knowing it could be used in court against me. I sign this statement because it is true."

T. 285-287.

Petitioner was indicted for the first degree murder of Deputy Arterbury on August 9, 1973.[13] Upon petitioner's motion, a Lunacy Commission of three doctors (one general practitioner and two psychiatrists) was appointed to examine him. While the Commission reported that petitioner was "not very bright," San. T. 18, and that he had spent nearly three years at the "Leesville School for Retardation", San. T. 18, 27, it concluded that he was competent to stand trial, San. T. 8, 15, 21.

During the selection of the jury at petitioner's trial, fourteen of the veniremen examined on voir dire were excused by the trial court for cause upon motion of the State because they expressed conscientious scruples concerning the imposition of the death penalty.[14]

13/ Four of petitioner's relatives were also indicted for this first degree murder by a St. Charles Parish grand jury on this August 9, 1973. On March 8, 1974, however, James Johnson (Indictment No. 30760) pleaded guilty to an accessory-after-the-fact-to-murder charge and was sentenced to one year in jail; James Washington (Indictment No. 30763) pleaded guilty to an identical charge and was sentenced to eight months and five days in jail; Rudolph Johnson (Indictment No. 30761) and Johnson Washington, Sr., (Indictment No. 30764) both pleaded guilty to manslaughter and were sentenced to, respectively, five years and eighteen years in the penitentiary.

14/ The complete text of the voir dire examination of the death penalty views of these veniremen is attached as Appendix C, infra. See also note infra.

At the conclusion of the State's case, petitioner introduced the testimony of ten witnesses. T. 367-440.

At the close of the evidence, the jury was instructed, in accordance with Louisiana's "responsive verdicts" rule, La. Code Crim. Proc. Ann. art. 814 (1975 supp.), see pp. 25-26 infra, that it could return verdicts of guilty of first degree murder, second degree murder, manslaughter, or not guilty. T. 509-511. The trial court informed the jury that "[w]hoever commits the crime of first degree murder shall be punished by death." T. 510. The jury, after the charge was reread to it during the course of its deliberations, T. 518-531, found petitioner guilty of first degree murder, T. 531, and the trial court subsequently sentenced him to death, Sent. T. 4.

On October 1, 1975, the Supreme Court of Louisiana affirmed petitioner's conviction and death sentence.[15/]

15/ On October 28, 1975, the Chief Justice of the Louisiana Supreme Court granted petitioner a stay of execution to enable petitioner "to seek review of his conviction and sentence in the Supreme Court of the United States, effective to December 15, 1975." On December 10, 1975, Mr. Justice Powell granted petitioner a stay of execution "pending the timely filing and disposition by this Court of a petition for a writ of certiorari."

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner filed a pre-trial motion to quash the indictment which alleged that the death penalty authorized in La. Rev. Stat. Ann. §14:30 constituted "cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution." This motion was denied, J.S.T. 37, and petitioner assigned this ruling as error: "[t]he statute of the State of Louisiana, Act 109, Section 1, of 1973, is in contravention of the constitution of the United States, especially the Eighth and Fourteenth Amendments and it was, therefore, error for the trial court to deny the motion to quash." (Assignment of Error No. 6). The Supreme Court of Louisiana rejected this contention:

> "[t]he . . . [petitioner] relies upon Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). However, in light of that decision, we have heretofore upheld the constitutionality of the capital punishment provisions of the murder statute. See State v. Hill, La., 297 So.2d 660 (1974); State v. Selman, La., 300 So.2d 467 (1974).
>
> Our prior decisions are controlling. This assignment of error is without merit."

State v. Washington, __La.__, 321 So.2d 763, 765 (1975).

II. Petitioner assigned as error the exclusion for cause of veniremen on account of their conscientious scruples against capital punishment:

> "The exclusion of veniremen with conscientious scruples against capital punishment deprived appellant of his Sixth Amendment right to a representative jury." (Assignment of Error No. 13).
>
> "The Test of Exclusion Used Below Failed to Satisfy the Minimum Standards for Death-Qualification Required by the Constitution of the United States as Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968)." (Assignment of Error No. 18).

A majority of the Supreme Court of Louisiana rejected this argument on its merits:

> "The . . . [petitioner] argues, however, that the fourteen jurors were improperly excused in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776.
>
> . . . .
>
> In the present case, . . . we note that the prospective jurors were informed during voir dire examination that the sentence for first degree murder was death. They were then questioned concerning their attitude toward capital punishment. In the light of the record, therefore, we assume that the holding of Witherspoon v. Illinois applies.
>
> . . . .
>
> We have examined the record in the present case. Each of the excused jurors was questioned at length by the State and, in most instances, by the trial judge. The prospective juror was excused for cause only when the testimony made clear that under no circumstances could he return a verdict of guilty of first degree murder or that his fixed opinions prevented an impartial determination of guilt based upon the evidence.
>
> We conclude that this assignment of error lacks merit."

State v. Washington, supra, 321 So.2d at 765-766.

III. Petitioner filed a pretrial "Motion to Suppress Confession and Item of Evidence Seized As a Result of the Confession," alleging that his confession and "a certain item of evidence [that] was subsequently recovered" should be suppressed because "such evidence [was] seized in violation of . . . [petitioner's] rights as guaranteed by the Fourth, Fifth and Sixth Amendments of the United States Constitution." Following a hearing, petitioner's motion was denied, M.S.T. 48, and both the pistol, T. 318, and the written confession, T. 283, were introduced at trial, over objection. Petitioner made the following assignments of

error:

> "The trial court erred when it denied defense counsel's motion to suppress." (Assignment of Error No. 4).
>
> "The lower court erred when it failed to suppress the written confession of the defendant . . . ." (Assignment of Error No. 14).
>
> "The lower court erred when it admitted State exhibit 13, the alleged murder weapon." (Assignment of Error No. 16).

The Supreme Court of Louisiana rejected these contentions:

> "The . . . [petitioner] argues that, prior to making the confession, the defendant was not effectively apprised of his rights as enunciated in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and that the confession was given 'under grave duress, coercion and fear.'
>
> . . . .
>
> . . . [Petitioner] also argues that the defendant's written confession was the product of an earlier inadmissible oral confession. The record does reveal that the defendant was questioned during the early morning hours of July 5, 1973. Although the record is not altogether clear, we assume arguendo that the defendant made an earlier inculpatory statement to Deputy Coleman. .. .
>
> [t]he Miranda warnings given in conjunction with the taking of the written and oral confessions were adequate to enable the defendant to make an informed waiver. We conclude that the confessions were not infected by the assumed earlier statement.
>
> Hence, the ruling of the trial judge was correct."

State v. Washington, supra, 321 So.2d at 767-768.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF LOUISIANA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

On January 22, 1976, the Court granted certiorari in Roberts v. Louisiana, No. 75-5844, to consider a similar question.

The Court has previously been presented with the arguments that the Louisiana capital procedures in an "aggravated rape" prosecution pursuant to La. Rev. Stat. Ann. §14:42 (1974), entail the kind of arbitrary selectivity (due to unregulated prosecutorial discretion, plea bargaining, and executive clemency) that violates the principle of Furman v. Georgia, 408 U.S. 238 (1972).[16/] The procedures for imposing the death penalty for first degree murder[17/] contain similar flaws and also explicitly allow unfettered sentencing discretion

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16/ These arguments were presented in the Petition for Certiorari filed in Selman v. Louisiana, No. 74-6065, (filed Feb. 24, 1975). Pages 17-30 and 42-43 of this Petition are attached hereto as Appendix B.

17/ Prior to 1973, Louisiana had not recognized degrees of murder. In that year, La. Acts 1973, Act 109 (amending La. Rev. Stat. Ann. §14:30 (1967)), defining the capital crime of first degree murder, La. Acts 1973, Act 110 (amending La. Rev. Stat. Ann. §14:29 (1967)), dividing "criminal homicide" into four grades (first degree murder, second degree murder, manslaughter, and negligent homicide), and La. Acts. 1973, Act 111 (enacting La. Rev. Stat. Ann. §14:30.1), defining a new non-capital crime of second degree murder were enacted.

on the part of the jury (although the provisions allowing the jury to recommend a life sentence as punishment for a capital charge were repealed),[18] since in every first degree murder case, regardless of the facts, the jury is instructed that it may render a "responsive" verdict of guilty of second degree murder or manslaughter, with non-capital consequences. La. Code Crim. P. Ann. art. 814 (A)(1)(1975 supp.).

The importance of this Court's grant of certiorari in Roberts v. Louisiana, No. 75-5844, Jurek v. Texas, No. 75-5394, Gregg v. Georgia, No. 74-6257, Proffitt v. Florida, No. 75-5706, and Woodson v. North Carolina, No. 75-5491, is highlighted by

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18/ At the time of Furman, article 817,La. Code Crim. Proc. Ann., provided:

> "In a capital case the jury may qualify its verdict of guilty with the addition of the words 'without capital punishment' in which case the punishment shall be imprisonment at hard labor for life.
>
> In noncapital cases, any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

In 1973, article 817 was amended to provide:

> "Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

the recent decision of the Massachusetts Supreme Judicial Court in Commonwealth v. O'Neal, ____Mass.____, ___N.E.2d ___, Mass. Adv. Sh. (1975) 3502, attached hereto as Appendix D,[19] which held a "mandatory" death penalty for murder during the course of a rape, imposed pursuant to Mass. Gen. L. c.265, §2, prohibited by the "cruel or unusual punishments" clause of Article 26 of the Massachusetts Declaration of Rights.[20]

19/ While the O'Neal decision rests on state constitutional grounds, see also People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), the Massachusetts court's reasoning and its discussion of federal precedents is relevant to this Court's consideration of the question of the Eighth Amendment constitutionality of capital punishment. "I believe that analysis of the issues raised in this case under our State Constitution bears strong resemblance to the analysis under the Federal Constitution." Commonwealth v. O'Neal, supra, Mass. Adv. Sh. (1975) at 3504 n.1 (concurring opinion of Mr. Chief Justice Tauro).

20 / Mr. Chief Justice Tauro and Mr. Justice Hennessey also relied on Articles 1, 10 and 12 of the Massachusetts Declaration of Rights (which, collectively, guarantee criminal defendants due process of law).

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF FOURTEEN VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. The Test of Exclusion Applied by the Court Below Did Not Meet the Minimum Standards Required by the Constitution As Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968).

During the selection of petitioner's jury, the State was permitted to challenge for cause fourteen veniremen because of their expression of conscientious scruples against the death penalty.[21] The Supreme Court of Louisiana assumed that Witherspoon v. Illinois, 391 U.S. 510 (1968) was applicable to Louisiana's "mandatory" death penalty procedures, but it ruled that the requirements of Witherspoon had not been violated:

> "Each of the excused jurors was questioned at length by the State and, in most instances, by the trial judge. The prospective juror was excused for cause only when the testimony made clear that under no circumstances could he return a verdict of guilty of first degree murder or that his fixed opinions prevented an impartial determination of guilt based upon the evidence."

State v. Washington, __La.__, 321 So.2d 763, 766 (1975).

21/ The fourteen veniremen excluded for cause on account of capital punishment scruples were: Monroe Douglas, J.S.T. 153-155; Harold E. Crow, J.S.T. 156-160; Steve Hill, J.S.T. 255-256; Floyd A. Williams, J.S.T. 269-270, 275, 276; Roy A. Mongrue, J.S.T. 272-273, 275,276; James T. Breaux, J.S.T. 273-274, 275, 276; Ronald L. Brown, J.S.T. 271-272, 274; William M. Carter, J.S.T. 304-305; James Smith, J.S.T. 313-323; James G. Volta, J.S.T. 377-378, 380; Alvin J. Folse, J.S.T. 378-380; A.J. Schillacti, J.S.T. 456-460; Haywood J. Jackson, J.S.T. 519-520; Edward W. James, J.S.T. 655-656. The full voir dire record of each of these fourteen examinations is appended as Appendix C, infra.

Petitioner respectfully submits that this conclusion does not accurately characterize the voir dire record in this case and that veniremen were in fact excluded who merely "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, supra, 391 U.S. at 522.

First, a great many of these exclusions were based on nothing more than a venireman's vague and general opposition to the death penalty and not on a clear and firm statement by the juror that the presence of the death penalty would prevent him or her from acting impartially or would cause an automatic vote of "not guilty." When asked if they could return a verdict resulting in the death penalty, veniremen were excluded who answered, "I don't think I would," "I think I would be real hesitant about it," "I don't believe I would," and "I don't think I could." For example, Venireman Monroe Douglas was excluded for cause on the basis of the following exchange:

> "Q. [the district attorney] Do you have any moral or religious scruples against the infliction of the death penalty?
> A. [venireman Douglas]: Well, that's kind of a hard question.
> Q. It's a hard business.
> A. Now, it tends into that.
> Q. I'm sorry, I can't hear you very well.
> A. It tends into that and what's been done about it.
> Q. Well, I'm asking you, sir, if you were convinced of the guilt of an accused beyond any reasonable doubt, any accused who was charged with a capital crime, could you consider a verdict of guilty knowing that it would carry the death penalty or are your scruples against the death penalty so strong that you wouldn't even consider that? That's what I'm asking you.
> A. I wouldn't want to put a fellow to death.

Q. Are you telling me then, sir, that regardless if you were chosen on this jury, that regardless of what the evidence from that witness chair showed that you would not even consider a verdict of guilty knowing that it would carry the death penalty?

A. See, my bible tells me, "Thou shalt not kill." I'm a Baptist.

Q. Yes, sir, but I would like for you to answer my question yes or no. Would you under any circumstances ever vote for the death penalty?
A. No, sir, I don't think I would.
Q. That is, regardless of what the evidence from this witness chair may show, you would not vote for a verdict that would necessarily carry the death penalty?
A. No, sir, I don't think so."

J.S.T. 154-155 (emphasis added). Venireman Harold E. Crow was excluded for cause on the basis of the following exchange:

"MR. SMITH [for the State]: Mr. Faucheaux, do you have any religious scruples against the death penalty?
MR. FAUCHEAUX: No, sir.
MR. SMITH: I take it . . . how about you, Mr. Madere?
MR. MADERE: No, sir.
MR. SMITH: Mr. Crow?
MR. CROW: Well, I think I would be real hesitant about it.
Q. Well, now, you really didn't answer that question. All of us might be hesitant. If you were chosen as a juror, sir, you would take an oath to perform your duty. I'll phrase the question to you as I phrased it to Mr. Douglas. Are you telling me, sir, that while you have these scruples, that regardless of what the evidence showed from the witness chair, that you would never under any circumstances vote for a verdict knowing that that verdict would necessarily carry the death penalty?
A. I don't believe I would."

J.S.T. 156-157 (emphasis added). Venireman Steve Hill was excluded for cause when he stated:

"I don't think I could vote to take a man's life, no, sir. A life sentence, maybe, or something like that."

J.S.T. 255 (emphasis added). Venireman Alvin J. Folse was

excluded for cause on the basis of the following exchange:

"MR. FOLSE: I don't believe in the death penalty either.

Q. [the district attorney]: I'll ask you if you have religious, moral or conscientious scruples against the infliction of the death penalty?

A. It's my feeling.

Q. Sir?

A. It's just my feelings, personal feelings.

Q. How long have you had those feelings?

A. I've always had them.

Q. Then I'll ask you the same question I asked Mr. Volta. Are your feelings against the death penalty so strong that you would not even consider rendering a verdict or voting for a verdict that necessarily would carry the death penalty regardless of what the evidence showed?

A. I don't think I could.

Q. You don't think you could even consider it, is that right?

A. Yes.

Q. In other words, what I'm trying to get at, if you will answer it plain, sir, is if you would not consider the death penalty at all regardless of what the evidence showed?

A. I don't think I could."

J.S.T. 378-379 (emphasis added).

Second, veniremen's scruples against the imposition of capital punishment in all circumstances were not made "unmistakably clear," as required by Witherspoon v. Illinois, supra, 391 U.S. at 522, n.21, in the absence of an instruction by the trial court that it is the civic duty of each venireman to sit as a juror if he possibly can. As this Court declared in Boulden v. Holman, 394 U.S. 478, 483-484 (1969): "it is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." A venireman must be instructed that the law requires him to

"subordinate his personal views to what he . . . [perceives] to be his duty to abide by his oath as a juror and to obey the law of the State," Witherspoon v. Illinois, supra, 391 U.S. at 514-515 n.7. Although a number of the excluded veniremen here stated that they would "automatically" vote against a verdict which entailed the imposition of a death sentence none of them was given any instruction on their duty to subordinate their beliefs to the law of Louisiana that would be given them by the trial court. See, e.g., J.S.T. 269-270 (exclusion for cause of venireman Floyd A. Williams); J.S.T. 272-273 (exclusion for cause of venireman Roy A. Mongrue); J.S.T. 274 (exclusion for cause of venireman Ronald L. Brown).

Moreover, the voir dire was in some cases simply too brief to determine with "unmistakable" certainty, Witherspoon v. Illinois supra, 391 U.S. at 522 n.21, that a venireman was properly excluded. For quick and seemingly unequivocal answers to questions concerning the death penalty often do not reveal a venireman's true sentiments. Here the trial court never instructed the veniremen that they would have no role in sentencing, and that they would be instructed upon a number of "responsive verdicts" which did not entail imposition of the death penalty; the veniremen thus were left in the dark as to their exact role. Had they understood that sentencing was not their responsibility and that they would be able to return a number of different guilty verdicts, it is possible that they might have been able to serve. But the perfunctory voir dire examination did not pause to enlighten them. See, e.g., J.S.T. 377-378 (exclusion for cause of venireman

James G. Volta. Cf. J.S.T. 655-656 (exclusion for cause of venireman Edward W. James).

Finally, a number of veniremen who expressed honest doubts about whether they could return a capital verdict nevertheless were pressured into giving a "yes" or "no" answer which could not accurately reflect their ambiguous feelings toward capital punishment. See e.g., J.S.T. 313-323 (exclusion for cause of venireman James Smith); J.S.T. 456-460 (exclusion for cause of venireman A.J. Schillaci). A venireman who answers that he doesn't honestly know whether he could render a death verdict is candidly and accurately reporting his feelings, and it is just such veniremen which Witherspoon protects. It is impermissible to force such jurors to give an unequivocal answer as to whether they would return a capital verdict. Several veniremen, after expressing doubts as to their feelings about the death penalty, were brow-beaten into giving a flat answer as to whether they could return a capital verdict, and were excluded for cause on the basis of their answers. Venireman Schillaci, for example, stated that he had "mixed emotions" about capital punishment, but that he would not have any problem determining guilt or innocence; he was excluded for cause despite the fact that he failed to state unequivocally that he could not return a capital verdict:

> "MR. SMITH [for the State]: . . . [D]o you have any such scruples against the infliction of the death penalty?
>
> . . . .
>
> MR. SCHILLACI: Well, I would have to know the complete circumstances.
>
> Q. Well, that, sir . . . [3 dots in transcript]

A. I don't know how old this boy is or if he's a hardened criminal or . . . [3 dots in transcript] I've got mixed emotions about capital - about the death penalty. I'm not against it, but I have reservations.

Q. Are you telling me that in a proper case vou could consider bringing in a verdict knowing that it would carry the death penalty?

A. I would be influenced by the circumstances that prevailed, the individual, the circumstances.

Q. Would that be sympathy for the accused?

A. Not so much sympathy for the accused as a general belief in humanity and humanness. I don't want to go into the emotional aspects.

Q. Well, I would like for you to, really. This is something we need to know.

A. I would have to know a lot more than I know about this individual, what kind of person he is, what kind of background he has, what his education is, how old is he, what prompted the act if he did commit the act.

. . . .

I really don't know. I'd like to have an alternative. I don't think I would have any problem finding a person guilty or not guilty.

Q. But where that verdict of guilty necessarily imposes the death penalty, would that give you a problem?

A. It would give me a problem, yes.

Q. Well, is your attitude toward the death penalty, sir, such that it would prevent you from making an impartial decision as to the defendant's guilt where you know that a verdict of guilty would carry the death penalty?

A. Frankly, I'm quite surprised to find this boy so young. I wouldn't have any problems with a hardened criminal type that had been prosecuted and in and out of jail or something of this type. But, really, I would almost have to know some background. It would be difficult for me to want to take the life of a person.

COURT: Mr. Schillaci is excused with the court's thanks."

J.S.T. 456, 460. Venireman James Smith stated that:

> "I feel that the death penalty is not, in itself, is not basically wrong. I believe it's even necessary in many cases. My main objection is that I am not sure that the degree of guilt that I would require to sentence a man to death is suitable under the terms as the court would present them."

J.S.T. 313-314. He stated, however, that he would have to be

extremely convinced of a capital defendant's guilt before he could return a verdict whose consequence was a death penalty, id. at 315-316, but he again stated:

> "I will say again that I believe capital punishment is a necessity. I will also say that I have always, as far as I can remember, believed capital punishment to be a necessity."
>
> . . . .
>
> Q. [defense counsel] . . . And it is also your testimony that you are not of the opinion that the death penalty as per se, is bad or unconstitutional or should not be applied?
> A. I also said that.
> Q. So that it is your testimony that in some instances the death penalty would be warranted. Is that correct?
> A. That is correct."

Id. at 318-319. Nevertheless, venireman Smith was badgered by extensive and repetitive questioning as to his views on the death penalty and was finally pressured into stating that "the State's definition of reasonable doubt would not bring . . . guilt to a degree that would be necessary for me to convict a man." Id. at 321. Venireman Smith's subsequent exclusion was plain error under Witherspoon since this questioning pressured him into the premature resolution of a difficult issue as to which he obviously felt great uncertainty.

B. The Exclusion of Veniremen with Conscientious Scruples Against Capital Punishment Deprived Petitioner of His Sixth Amendment Right to a Representative Jury.

In order to avoid subjecting the Court to redundant argument, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Writ of Certiorari to the Supreme Court of Florida, Hallman v. Florida, No. 74-6168 (filed March 11, 1975) at 72-78 (attached as Appendix D, infra).

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER INTRODUCTION AT PETITIONER'S CAPITAL TRIAL OF HIS WRITTEN CONFESSION AND OF A PISTOL WHICH PETITIONER RETRIEVED FOR THE POLICE VIOLATED HIS FIFTH AMENDMENT RIGHT AGAINST COMPULSORY SELF INCRIMINATION WHEN THIS STATEMENT AND PHYSICAL EVIDENCE WERE OBTAINED AS A DIRECT CONSEQUENCE OF AN EARLIER COERCED ORAL CONFESSION WHICH WAS NOT INTRODUCED.

The Supreme Court of Louisiana has countenanced at a capital trial, the admission of testimonial and physical evidence obtained by means of a coerced oral confession. While the court below found petitioner's written statement to be voluntary and given in conformity with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), it failed to recognize that this confession (and the murder weapon) were the fruits of an earlier illegally obtained confession.[22/] Moreover, the Louisiana Supreme Court applied an erroneous "totality of the circumstances" test to determine that this evidence was admissible and implicitly held that later Miranda warnings erased the consequences of earlier duress and coercion. Here,

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22/ Cf. Stein v. New York, 346 U.S. 156, 185 (1953):

> "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."

the will of a legally unsophisticated, young, and frightened defendant, charged with a heinous crime and unadvised by counsel, was overborne during an intense stationhouse interrogation, and a statement was obtained from him which, though not introduced at trial, led the police to other evidence and was used to elicit from petitioner a second written confession which was introduced. Significant questions are presented as to the admissibility of evidence obtained as a result of a coerced confession.

The record below, see pp. 8-21 supra, reveals that petitioner was a black, "not very bright," San. T. 18, semiliterate twenty-year-old,[23] who had a fourth grade, M.S.T. 33, or

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23/ Petitioner testified that "I can read a little bit but I can't quite understand. Some things I can understand and some things I can't read it and then understand it." M.S.T. 34. When petitioner was asked to read his written statement (the police had testified that after they transcribed his statement, they read it back to him and then gave it to him to read, M.S.T. 95), the following occurred (this reading should be compared to the written statement, quoted at pp. 19-20, supra):

> "If you can't read a word advise the court that you can't read a word and then skip on to the next word.
> JOHNSON WASHINGTON, JR. (cont'd with document)
> The following is a true of Johnson Washington, Jr. (and I don't know this word here) Fifth, 30, born in and 18 Killona. Dis is in - of on the night of July 4, 73. Rudolf Johnson and myself went to the Night Cap Lounge, to the Night Cap, to the Night Cap to hop. I give a dollar bill to (what's that name, I don't know) and he give me 50 cents back. Rudolf, Rudolf, a $5.00 bill and went and sat at a back table, a table a little while. Rudolf asked for his change, to give him his change. I left and went to the bathroom. When I came back Rudolf and ------ was fighting. Jimmie Scott and me tried to the fight up but I went outside and, and, her husband and her hand put a gun on us.

"6th or 7th grade," San. T. 33, education, and who had attend-

the state Leesville School for the Retarded for about three years, San. T. 18, 27. The Louisiana Supreme Court concluded that "[t]here can be no doubt that . . . [petitioner] was of low intellect." State v. Washington, __La.__, 321 So. 2d 763, 767 (1975). He apparently had no prior criminal record. Late on July 4, 1973, he was arrested for a particularly heinous crime: the murder of a white police officer. The Parish was

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23/ cont'd.

> Someone calleded why this was, why this was going on. A short while later he walkeded inside the bar to, to, tell, to tell, to, told someone. He stayed inside for a while then come, then come out and asked who, who was 'Pops'. I said I was 'Pops'. The he Then he, he said he would like to tell, to tell, tell to Rudolf and you. The, the, the went back inside to, to get I guess he wanted to tell, to two or three of us at once. When the came back outside he was by hisself. I guess he, I guess he couldn't find - he walked to the and open and opened it and got out and got out gun. He walkeded on the side of it with the gun. We was telling, we were telling to each other. He told me, he told me, e,e,e,e,e,e,e, told me, he didn't want any--he just wanted us to------then my-then my dad, Johnson Washington, S., and James Washington, Rudolf Johnson, they all, they all, they all trieded to trieded to, trieded to, trieded to, trieded to the gun away from the while my, my dad, James Rudolf were fighting with the the the the gun went off, the gun went off in, in, in, in, in, air, the air. Then, then I to the side of it he his gun out of it him, him went one time in the in the, the the for to the James Johnson, Rudolf Johnson and myself got into the car and of and, and the and, and the gun. Then I went, then I went home and her and they came a while after I had, I had the, and, and, and, and, and, half of on, on, on the and the to be and the to be to, to, to, the of 1 my . . . . I give it with no---the, the, the, be in the, be in, in me-- I, I, I, I, dis the, the is. That is all on here."

M.S.T. 35-36 (the foregoing is a verbatim reproduction of the transcript).

in an uproar: an all-out manhunt was initiated, "[j]ust about everybody [on the police force] was out there," T. 294, and a number of arrests were made. Petitioner was forcibly, M.S.T. 86, arrested at his home by a number of heavily armed deputies, although they testified that they gave him the Miranda warnings, see p. 13 supra.

Petitioner was one of at least five persons arrested for the murder of Deputy Arterbury. The police were uncertain who fired the fatal shot, and kept asking their prisoners, "'Who shot? Who shot?'", M.S.T. 70. At the stationhouse, petitioner was interrogated several times throughout the night by large numbers of police officers, see pp. 14-15 supra, and he appeared "nervous", M.S.T. 16, "upset", id., and "frightened", T. 296. The questioning of the interrogating officers was, by their account, "vehement", T. 300. Petitioner introduced evidence, which was controverted by the State,[24/] that he was physically beaten during the course of

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24/ The record in this case, although it is frequently confusing and self-contradictory, will simply not support many of the conclusions of the Louisiana Supreme Court concerning the question whether petitioner was physically abused. The court asserts that

> "Officers Loque [sic] and Coleman, who were at the jail during much of the morning of July 5, 1973, testified that they were able to view the . . . [petitioner] in his cell frequently and saw no evidence of intimidation or physical abuse. Officers St. Pierre and Kimble testified to the same effect. Officer Gary Zeringue, who photographed the defendant at about 8:00 a.m., on July 5, 1973, described the . . . [petitioner] as looking 'normal.' Dr. Wilson Couch, who treated the . . . [petitioner] on August 1, 1973, saw no signs of physical abuse."

State v. Washington, supra, 321 So.2d at 767.

these interrogations, see note 8, supra. At some point during the early morning hours of July 5, 1973, petitioner gave an oral statement to the police, admitting his complicity in the murder

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24/ cont'd.

Although Zeringue did observe that petitioner looked "normal", M.S.T. 25, when he photographed him, this occurred not at 8:00 a.m., July 5, but instead shortly after petitioner's arrest late on July 4 when petitioner was brought to the courthouse before the interrogation began, M.S.T. 23. Zeringue further testified that this was the only time he saw petitioner in the July 4-5 period. M.S.T. 25.

Detective St. Pierre and Deputy Kimble did not testify that petitioner was not physically abused between the time of his arrest and the time of his formal interrogation at 8:00 a.m., July 5. Detective St. Pierre arrested petitioner at 10:30 or 10:45 p.m., July 4, M.S.T. 75. He turned petitioner over to officers who took him back to the station house, and "I couldn't tell you what happened to him after I turned him over," M.S.T. 91. Detective St. Pierre next saw petitioner "around 6:30 or 7:00 the next morning, July 5, ibid. Deputy Kimble was present at the time of petitioner's arrest and drove petitioner to the station house; he testified that no one "physically abuse[d]" M.S.T. 99, petitioner when he was arrested or when he was transported to the station house, M.S.T. 100. Deputy Kimble testified, however, that after he turned petitioner over for booking he had "[no] further contact with him," ibid., either "[t]hat night," M.S.T. 101, or "the next day," ibid.

Dr. Couch testified that he first saw petitioner on August 17, 1973, six weeks after the arrest, and not on August 1, 1973, M.S.T. 43.

The testimony of Officers Laque and Coleman was contradictory in several important respects. Laque, the jailer, testified that he locked petitioner in a jail cell about midnight, M.S.T. 26, and that each time he made his rounds that night, petitioner was lying on his bed. M.S.T. 27. Laque stated that he never saw anyone questioning petitioner that night because questioning never took place in the jail, ibid., although he admitted that petitioner could have been removed from his cell in his, Laque's, absence since the other deputies had a key to the cell, M.S.T. 30. Laque added that petitioner was in his cell at 8:00 a.m. when he was served breakfast. M.S.T. 31-32. Coleman testified, however, that he saw petitioner ten or twelve times during the night in different rooms at the police station and that petitioner was always awake when he saw him, M.S.T. 3-4. Shortly after 6:45 a.m., M.S.T. 4, Coleman elicited an oral confession from petitioner, and he immediately took petitioner to a canal to retrieve the murder weapon.

of Deputy Arterbury. Petitioner also said he would lead the police to where he had disposed of the murder weapon. He retrieved the pistol from a canal and subsequently gave a statement to the police, apparently recapitulating his earlier confession, after he had been given Miranda warnings and had signed a waiver of his rights.

The trial court made no formal findings of fact concerning the voluntariness of the written confession, but on the basis of a pre-trial hearing and of a hearing outside the presence of the jury at trial, it ruled this confession admissible. T. 283. Since the State chose not to introduce petitioner's oral confession, the trial court made no formal findings of facts nor any ruling on the voluntariness or admissibility of this earlier confession. The Louisiana Supreme Court ruled that the written confession was not infected by any involuntariness of the earlier confession:

24/ cont'd.

When they returned, he took petitioner straight into Deputy St. Pierre's office at 8:00 a.m., T. 309-311.

Several officers testified that they saw petitioner being questioned by a large number of people during the night but these witnesses were consistently unable to recall who the interrogators were: "[T]here was a lot of policemen there . . . . They had a lot of them there . . . . I couldn't pinpoint anybody that they had there." (Deputy Walker, T. 256); "They had just quite a few people in there. I couldn't just tell you right offhand, name them," (Deputy Coleman, T. 308); "[I] don't recall who the officers were who were in there," (Detective St. Pierre, T. 237).

"the . . . [petitioner] also argues that . . . [his] written confession was the product of an earlier inadmissible oral confession. The record does reveal that the . . . [petitioner] was questioned during the early morning hours of July 5, 1973. Although the record is not altogether clear, we assume arguendo [25/] that the . . . [petitioner] made an earlier inculpatory statement to Deputy Coleman.

The State did not introduce the earlier statement at trial. Since Miranda warnings were properly given upon . . . [petitioner's] arrest, we find no basis in the record for holding that the earlier statement was inadmissible. Moreover, considering the 'totality of the circumstances,' we hold that the . . . [petitioner's] later confession was sufficiently insulated from the earlier statement. See Clewis v. Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); Darwin v. Connecticut, 391 U.S. 346, 88 S.Ct. 1488, 20 L.Ed.2d 630 (1968).

The record reflects that the . . . [petitioner's] confession, which was admitted in evidence, was given sometime later in the morning to Officer St. Pierre, who had not seen the . . . [petitioner] since shortly after his arrest. Our earlier analysis assures us that the Miranda warnings given in conjunction with the taking of the written and oral confessions were adequate to enable the . . . [petitioner] to make an informed waiver. We conclude that the confessions were not infected by the assumed earlier statement."

Washington v. State, supra, 321 So.2d at 768.

25/ There can be no doubt that petitioner made "an earlier inculpatory statement to Deputy Coleman" since he led the deputy to the murder weapon before the written confession was taken. M.S.T. 5-8; T. 309, 317, 327.

This ruling is manifestly erroneous. It is clear that a confession which is the direct consequence of an earlier coerced confession must be suppressed, regardless of how "voluntary" the second confession appears to be, when considered on its own. However, the Louisiana Supreme Court has incorrectly assigned the burden of proof on the issue whether the second confession is "sufficiently insulated" from the first. As this Court recognized long ago,

> "after an accused has once let the cat out of the bag by confession, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag . . . . In such a sense, a later confession always may be looked upon as fruit of the first."

United States v. Bayer, 331 U.S. 532, 540 (1947).

The proper inquiry in this case is not whether the second confession is voluntary under a "totality of the circumstances" test but rather whether the State has borne the burden of affirmatively showing that the second confession is uninfluenced by the first.[26/] As Justice Harlan wrote, concurring in the Court's

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26/ Cf. Harrison v. United States, 392 U.S. 219, 225, n.12 (1968): "when the prosecution seeks to use testimony given after the introduction in evidence of a confession unlawfully obtained, it has the burden of proving the defendant's testimony was not produced by the illegal use of his confession at trial."

judgment in Darwin v. Connecticut, 391 U.S. 346 (1968), another multiple confession case:

> "A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think he has little to lose by repetition. If a first confession is not shown to be voluntary, I do not think a later confession that is merely a direct product of the earlier one should be held to be voluntary. It would be neither conducive to good police work, nor fair to a suspect, to allow the erroneous impression that he has nothing to lose to play the major role in a defendant's decision to speak a second or third time.
>
> In consequence, when the prosecution seeks to use a confession uttered after an earlier one not found to be voluntary, it has, in my view, the burden of proving not only that the later confession was not itself the product of improper threats or promises or coercive conditions, but also that it was not directly produced by the existence of the earlier confession."

391 U.S. at 350-351. This test was subsequently adopted by the Court in Robinson v. Tennessee, 392 U.S. 666 (1968) and in Harrison v. United States, 392 U.S. 219, 225 n.12 (1968) (dictum). See also Beecher v. Alabama, 389 U.S. 35, 36 n.2 (1967); Clewis v. Texas, 386 U.S. 707, 710 (1967); Beecher v. Alabama, 408 U.S. 234, 236-237 (1972). The State made no showing here that the second confession was not a "direct product of the earlier one." The Louisiana Supreme Court erroneously concluded that the Miranda warnings administered before petitioner's written statement was taken were a "'cure-all'", Brown v. Illinois, __U.S.__, 45 L.Ed.2d 416, 426 (1975), for the earlier violation of petitioner's Fifth Amendment rights.

The .357 magnum pistol belonging to Deputy Arterbury was also retrieved as a direct consequence of the oral confession, and the question left unresolved in Michigan v. Tucker, 417 U.S. 433 (1974) is thus presented here: does the Fifth Amendment bar the State from using physical evidence derivatively obtained as a result of an involuntary confession? The Court emphasized in Tucker that the failure of the police to warn a suspect of his right to have counsel appointed if he could not afford to retain counsel "did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards . . .laid down by this Court in Miranda to safeguard that privilege." 417 U.S. at 446. The testimony of a witness, whose identity was disclosed to the police by petitioner Tucker after the deficient Miranda warning was given, was therefore held admissible.

The present case does not involve violation of simply a "prophylactic" rule whose purpose is to protect the underlying privilege or to deter police conduct which invades the privilege. Instead, petitioner's basic right not to be coerced into incriminating himself was infringed here, a right which is founded not solely on the unreliability of the evidence obtained through coercion:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, . . . and even though there is ample evidence aside from the confession to support the conviction."

Jackson v. Denno, 378 U.S. 368, 376 (1964). The Fifth Amendment prohibits the use of involuntary confessions and their fruits not only because such confessions may be unreliable as evidence but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," Blackburn v. Alabama, 361 U.S. 199, 206-207 (1960), and because of the "deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320-321 (1959). See also Manness v. Meyers, __U.S. __, 42 L.Ed.2d 574, 585 (1975).

In Kastigar v. United States, 406 U.S. 441 (1972), a case involving derivative evidence obtained as a result of an immunity grant, the Court compared the respective positions of "a defendant against whom incriminating evidence has been obtained through a grant of immunity" with "a defendant who asserts a Fifth Amendment coerced-confession claim," 406 U.S. at 461. It concluded that the only difference was that the latter defendant "must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible," 406 U.S. at 462. The plain implication is that, once involuntariness of a confession is shown, the prosecution must shoulder "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the [confession]," 406 U.S. at 460.

Conclusion

Certiorari should be granted to consider the Fifth Amendment questions raised by the introduction at petitioner's trial of his written confession and of Deputy Arterbury's pistol.

RESPECTFULLY SUBMITTED,

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Appendix A

State v. Washington,
__La.__, 321 So.2d 763
(1975).

STATE of Louisiana

v.

Johnson WASHINGTON, Jr.

No. 55806.

Supreme Court of Louisiana.

Oct. 1, 1975.

Defendant was convicted before the 29th Judicial District Court, Parish of St. Charles, Thomas J. Malik, J., of first-degree murder, and he appealed. The Supreme Court, Sanders, C. J., held that mandatory death sentence imposed upon defendant, who had been convicted of first-degree murder of a deputy sheriff, was not cruel and unusual punishment nor a denial of defendant's right to equal protection; that exclusion for cause of 14 jurors following determination that such jurors could not return verdict of guilty of first-degree murder knowing that such verdict mandated death sentence or that their fixed opinions on capital punishment prevented impartial determination of guilt based upon the evidence did not violate ban on exclusion for cause of jurors who merely voice general objections to capital punishment or express conscientious or religious scruples against its infliction; and that defendant's written confession was admissible.

Affirmed.

Tate, J., filed concurring statement.

Calogero, J., filed concurring opinion.

1. Constitutional Law ⇐250.3(1)
Criminal Law ⇐1213

Imposition of mandatory death sentence upon defendant, who had been convicted of first-degree murder of a deputy sheriff, under first-degree murder statute was not cruel and unusual punishment nor a denial of defendant's right to equal protection. LSA-R.S. 14:30; U.S.C.A.Const. Amends. 8, 14.

2. Jury ⇐108

Holding that sentence of death cannot be carried out if jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to death penalty or expressed conscientious or religious scruples against its infliction is not strictly applicable to exclusion of jurors for cause under statutory scheme in which sentence is not "imposed or recommended" by jury. LSA-C.Cr.P. arts. 798(2), 817; LSA-R.S. 14:30.

3. Jury ⇐108

Although jurors who voice general objections to capital punishment or express conscientious or religious scruples against its infliction may not constitutionally be excluded for cause, jurors who state they will not vote for verdict that carries capital punishment may be so excluded. LSA-C.Cr.P. art. 798(2).

4. Jury ⇐108

Exclusion for cause of 14 jurors following determination that such jurors could not have returned verdict of guilty of first-degree murder knowing that such verdict mandated death sentence or that their fixed opinions on capital punishment prevented impartial determination of guilt based upon the evidence did not violate constitutional ban on exclusion for cause of jurors who voice general objections to capital punishment or express conscientious or religious scruples against its infliction. LSA-C.Cr.P. art. 798(2); LSA-R.S. 14:30.

5. Criminal Law ⇐517.2(2)

Low intelligence alone does not vitiate waiver of Miranda rights and confession.

6. Criminal Law ⇐531(1)

In determining whether confession is admissible, question is always whether State has borne its burden of proving that defendant was advised of his rights, that he voluntarily elected to make statement.

and that his confession was otherwise free and voluntary.

7. Criminal Law ⇐517.2(2)

Where defendant, who allegedly possessed low intelligence, was orally advised of Miranda rights at time of his arrest, stated he understood such rights and was serially questioned as to whether he understood rights waived prior to transcription of written confession the next morning, and such written confession was, considering totality of circumstances, insulated from oral confession alleged to have been illegally obtained on night of arrest, written confession was admissible.

Jacques F. Bezou, New Orleans, Garon, Brener & McNeely for defendant-appellant; David E. Kendall, NAACP Legal Defense and Educational Fund, Inc., New York City, of counsel.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Melvin P. Barre, Dist. Atty., Walter L. Smith, Jr., Asst. Atty. Gen., Norman J. Pitre, Asst. Dist. Atty., for plaintiff-appellee.

SANDERS, Chief Justice.

The Grand Jury of St. Charles Parish indicted Johnson Washington, Jr. for the first degree murder of James Allen Arterbury, a deputy sheriff of St. Charles Parish, in violation of LSA-R.S. 14:30. Washington, represented by retained counsel, was arraigned and pleaded not guilty and not guilty by reason of insanity. He was granted sixty days to file preliminary pleadings.

Upon a defense motion, the court appointed a lunacy commission to examine the defendant. After a hearing, the court found him competent to stand trial.

On January 31, 1974, the jury returned a verdict of guilty as charged. Later, the trial judge imposed the mandatory death sentence. The defendant appeals, relying on three assignments of error.

The background facts are as follows: Deputy James Allen Arterbury of the St. Charles Parish Sheriff's Office answered a disturbance call at the Nite Cap Lounge in Killona, Louisiana about 8:30 p.m., on July 4, 1973. Because the crowd became unruly, the deputy returned to his car, called for assistance, and took his shotgun from the trunk.

Deputy Arterbury walked toward the crowd, keeping the muzzle of the shotgun pointed skyward at all times. The crowd became more belligerent and surrounded the deputy sheriff. Someone grabbed the deputy's shotgun and it discharged harmlessly into the air. Washington then took the revolver out of the officer's holster and shot him in the back. The crowd scattered, leaving the fallen officer mortally wounded.

ASSIGNMENT OF ERROR NO. 1

[1] Prior to trial, defense counsel filed a motion to quash the indictment alleging the unconstitutionality of LRS-R.S. 14:30, the first degree murder statute. The defendant asserts that the mandatory death penalty constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and is a denial of equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

LSA-R.S. 14:30 reads as follows:

"First degree murder is the killing of a human being:

* * * * * *

"(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties;

* * * * * *

"For the purposes of paragraph (2) herein, the term peace officer shall be

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defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.

"Whoever commits the crime of first degree murder shall be punished by death."

The defendant relies upon *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). However, in light of that decision, we have heretofore upheld the constitutionality of the capital punishment provisions of the murder statute. See *State v. Hill*, La., 297 So.2d 660 (1974); *State v. Selman*, La., 300 So.2d 467 (1974).

In *State v. Hill*, supra, where the defendant had been convicted under paragraph (4) of LSA-R.S. 14:30, we held:

"The death penalty for murder, when the perpetrator has the intent to kill or inflict great bodily harm on more than one person, is neither barbarous nor disproportionate to the offense. See *State v. Selman*, supra; *State v. Crook*, 253 La. 961, 221 So.2d 473 (1969); 21 Am. Jur.2d, Criminal Law, § 613, p. 563. In fact, the Due Process Clause of the United States Constitution sanctions the death penalty when it is imposed with due process of law.

"We conclude, therefore, that capital punishment *per se* is not constitutionally proscribed."

In *Hill*, we also rejected defense counsel's equal protection argument, stating:

"As provided in the statute, the death penalty is mandatory for first degree murder. Article 817 of the Louisiana Code of Criminal Procedure, as amended by Act 125 of 1973, prohibits a qualification of the guilty verdict. If the defendant is found guilty as charged, the trial judge must impose the death penalty. The penalty cannot be applied in a discriminatory manner. See *Furman v. Georgia*, supra; *State v. Holmes*, 263 La. 685, 269 So.2d 207 (1972). It is true that Article 814, as amended by Act 126 of 1973, lists as responsive verdicts second degree murder, carrying a sentence of life imprisonment, and manslaughter, carrying a sentence of imprisonment up to 21 years. See LSA-R.S. 14:30.1; LSA-R.S. 14:31. The use of these lesser verdicts, however, is contingent upon the jury finding insufficient evidence to convict the defendant of first degree murder, with which he is charged. The jury is concerned only with guilt. It has no sentencing function. LSA-La.Const. Art. 19, Sec. 9 (1921); LSA-C.Cr.P. Art. 802."

Our prior decisions are controlling. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

During the examination of prospective jurors, the trial court excused fourteen jurors for cause. In so doing, the trial judge relied on Paragraph (2) of Article 798 of the Louisiana Code of Criminal Procedure, which provides that it is good cause for challenge by the State that:

"The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; . . ."

The defense argues, however, that the fourteen jurors were improperly excused in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776

(1968). In that case, the United States Supreme Court held:

". . . [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."

At the time *Witherspoon v. Illinois* was decided by the United States Supreme Court, a Louisiana jury in a capital case could return a verdict of "guilty without capital punishment." The mandatory sentence for such a verdict was life imprisonment rather than death. LSA-C.Cr.P. Art. 817. After *Furman v. Georgia* was decided, our legislature restructured its capital punishment provisions to comply with that decision. The death sentence was authorized for a restricted number of crimes, but it was made mandatory, thus eliminating the discretion formerly exercised by the trial jury. See, e. g., LSA-R.S. 14:30; LSA-C.Cr.P. Art. 817, as amended by Act 502 of 1972 and Act 125 of 1973. Thus, in Louisiana, the trial jury now has no role in sentencing.

[2] We can reasonably conclude that under the revised procedure, the sentence is not "imposed or recommended" by the jury. Hence, the holding in *Witherspoon*, designed to avoid a "hanging jury," would not be strictly applicable.

In the present case, however, we note that the prospective jurors were informed during *voir dire* examination that the sentence for first degree murder was death. They were then questioned concerning their attitude toward capital punishment. In the light of the record, therefore, we assume that the holding of *Witherspoon v. Illinois* applies.

The *Witherspoon* holding is narrow. The Court stated:

"The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it."

[3] Thus, it is clear that the holding only bans the exclusion of jurors who voiced general objections to capital punishment or expressed conscientious or religious scruples against its infliction. It does not ban the exclusion of jurors who state they will not vote for a verdict that carries capital punishment. See *State v. Brown*, La., 302 So.2d 290 (1974); *State v. Cripps*, 259 La. 403, 250 So.2d 382 (1971); *State v. Pratt*, 255 La. 919, 233 So.2d 883 (1970).

[4] We have examined the record in the present case. Each of the excused jurors was questioned at length by the State and, in most instances, by the trial judge. The prospective juror was excused for cause only when the testimony made clear that under no circumstances could he return a verdict of guilty of first degree murder or that his fixed opinions prevented an impartial determination of guilt based upon the evidence.

We conclude that this assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 3

This assignment relates to the trial court's refusal to grant the defense motion

to suppress a confession made by the defendant. The defense argues that, prior to making the confession, the defendant was not effectively apprised of his rights as enunciated in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and that the confession was given "under grave duress, coercion and fear."

The three officers present at the arrest, Coleman, St. Pierre, and Kimble, testified that, on his arrest, the defendant was orally advised of his *Miranda* rights (Tr. 14, 73, 99). Both the defendant and his father indicated that they understood these rights.

Officers Loque and Coleman, who were at the jail during much of the morning of July 5, 1973, testified that they were able to view the defendant in his cell frequently and saw no evidence of intimidation or physical abuse. Officers St. Pierre and Kimble testified to the same effect. Officer Gary Zeringue, who photographed the defendant at about 8:00 a.m., on July 5, 1973, described the defendant as looking "normal." Dr. Wilson Couch, who treated the defendant on August 1, 1973, saw no signs of physical abuse.

Between 8:20 and 9:00 a.m., the defendant signed a statement acknowledging that he had been advised of his *Miranda* rights. During that time interval, he also signed a confession, which contains a recital that it was given voluntarily and without any threats or promises.

The defense contends, however, that because of defendant's low intelligence and inadequate education, he did not knowingly waive his rights and had no adequate understanding of what he was signing.

[5, 6] The record reflects that the defendant had an education described by his mother as "sixth or seventh grade." Defendant, himself, described his education as being "to the fourth grade." He attended the Leesville School for the retarded for about two years. There can be no doubt that he was of low intelligence. Low intelligence alone, however, does not vitiate the waiver and confession. See *State v. Edwards*, 257 La. 707, 243 So.2d 806 (1971); *State v. Chinn*, 229 La. 984, 87 So.2d 315 (1955). The question must always be whether the State has borne its burden of proving that the defendant was advised of his rights, that he voluntarily elected to make a statement, and that his confession was otherwise free and voluntary.

Officer St. Pierre, who witnessed the signing of both documents, testified that he first serially questioned the defendant as to whether he understood the rights waived, a standard method for obtaining an effective waiver from a person of subnormal intelligence. The defendant answered each question affirmatively and then signed the "Voluntary Statement" form. Officer St. Pierre testified that he then transcribed the defendant's confession as the defendant related it to him.

The defendant was questioned at the hearing on the Motion to Suppress regarding his waiver and the confession. Although he denied being given the *Miranda* warnings, he testified in substantial accord with his written confession. He stated:

> "Then I moved to the side of the deputy, pulled his gun out of the holster and shot him one time in the right back side." (Tr. 52).

In contending that the waiver executed here was ineffective, the defense also relies on the *Miranda* principles set forth in *Westover v. United States*, 384 U.S. 436, 494, 86 S.Ct. 1602, 1638, 16 L.Ed.2d 694, 735 (1966).[1] Westover had been arrested

1. *Carl Calvin Westover v. United States* was consolidated for treatment with *Ernesto A. Miranda v. State of Arizona*, *Michael Vignera v. State of New York*, and *State of California v. Roy Allen Stewart*. *Westover* is commonly cited *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, it is separately cited here because of the particular factual circumstances of Westover's arrest.

at 9:45 p. m., not given any *Miranda*-type warnings, and was interrogated throughout the night and following morning by the local police. He was turned over to FBI agents at noon and confessed two and one-half hours later. The Supreme Court found "[no] evidence of an articulated waiver of rights after the FBI commenced its interrogation." In the instant case, however, the *Miranda* warnings were given to Washington upon his arrest and prior to his confession. The defendant waived individually each right, both orally and in writing.

Westover, therefore, is factually distinguishable.

In connection with this assignment, the defense also argues that the defendant's written confession was the product of an earlier inadmissible oral confession. The record does reveal that the defendant was questioned during the early morning hours of July 5, 1973. Although the record is not altogether clear, we assume *arguendo* that the defendant made an earlier inculpatory statement to Deputy Coleman.

[7] The State did not introduce the earlier statement at trial. Since *Miranda* warnings were properly given upon defendant's arrest, we find no basis in the record for holding that the earlier statement was inadmissible. Moreover, considering the "totality of the circumstances," we hold that the defendant's later confession was sufficiently insulated from the earlier statement. See *Clewis v. Texas*, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); *Darwin v. Connecticut*, 391 U.S. 346, 88 S.Ct. 1488, 20 L.Ed.2d 630 (1968).

The record reflects that the defendant's confession, which was admitted in evidence, was given sometime later in the morning to Officer St. Pierre, who had not seen the defendant since shortly after his arrest. Our earlier analysis assures us that the *Miranda* warnings given in conjunction with the taking of the written and oral confessions were adequate to enable the defendant to make an informed waiver. We conclude that the confessions were not infected by the assumed earlier statement.

Hence, the ruling of the trial judge was correct.

For the reasons assigned, the conviction and sentence are affirmed.

DIXON and BARHAM, JJ., concur.

CALOGERO, J., concurs and assigns reasons.

TATE, J., concurs: As to Bill No. 2, see my concurring opinion in *State v. Watts*, 320 So.2d 146 (rendered this date).

CALOGERO, Justice (concurring).

I concur in the affirmance of this defendant's conviction and sentence, but I disagree with the majority's handling of Assignment of Error No. 2. While the trial court did indeed excuse fourteen jurors for cause, allegedly because they indicated that they could not vote for the imposition of capital punishment despite the evidence of guilt presented by the state, the record reveals that defense counsel acquiesced in those rulings by the trial court. No objection, based upon either *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), or upon Article 798(2) of the Code of Criminal Procedure, was made by defense counsel at the time the jurors were excused. Accordingly, defendant cannot avail himself of this alleged error on appeal. Art. 841, C.Cr.P. See *State v. Watts*, La., 320 So.2d 146, decision rendered this date.

Appendix B

Pp. 17-30 and pp. 42-43 of the
Petition for Writ of Certiorari
in Selman v. Louisiana, No. 74-6065
(filed February 24, 1975).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED RAPE UNDER THE LAW OF LOUISIANA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

On June 29, 1972, this Court held that the death penalty could no longer be imposed under statutory schemes which permit its arbitrary, rare, and irregular infliction. Furman v. Georgia, 408 U.S. 238 (1972).. The Louisiana legislature subsequently modified its capital procedures [7] by abolishing the power of

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7/ Eight statutes were enacted to revise Louisiana's capital punishment procedures after Furman:

(1) La. Acts 1973, Act 109 (amending La. Rev. Stat. Ann. §14:30 (1967)) defined the capital crime of first degree murder. Previously, Louisiana had not recognized degrees of murder;

(2) La. Acts 1973, Act 110 (amending La. Rev. Stat. Ann. §14:29 (1967)) divided "criminal homicide" into four grades: first degree murder, second degree murder, manslaughter, negligent homicide;

(3) La. Acts 1973, Act 111 (enacting La. Rev. Stat. Ann. §14:30.1 (1974)) defined a new non-capital crime of second degree murder;

(4) La. Acts 1973, Act 125 (amending La. Code Crim. Proc. Ann. art. 817 (1967) abolished the jury's power to qualify a capital verdict with the words "without capital punishment;"

(5) La. Acts 1973, Act 126 (amending La. Code Crim. Proc. Ann. art. 814 (1967)) defined the verdicts which would be "responsive" to a capital charge, omitting the verdicts "Guilty without capital punishment" in cases where a defendant is charged with first degree murder, aggravated rape, and aggravated kidnapping, and adding the verdict of "Guilty to second degree murder" in cases where a defendant is charged with first degree murder;

(6) La. Acts 1973, Act 127 (amending La. Rev. Stat. Ann. §14:31 (1967)) made a technical adjustment in the definition of manslaughter;

(7) La. Acts 1973, Act 133 (amending La. Code Crim. Proc. Ann. art. 598 (1967)) altered the article defining the effect of a verdict of conviction of a lesser offense by deleting the sentence: "When a jury returns a verdict of guilty without capital punishment, the defendant cannot thereafter on a new trial be sentenced to death;"

(8) La. Acts 1973, Act 134 (amending La. Code Crim. Proc. Ann. art. 557 (1967)) altered the article prohibiting guilty pleas to capital offenses by deleting the sentence: "The defendant,

the jury to make a recommendation of mercy when returning a capital verdict.[8] La. Acts 1973, Act. 125 (amending La. Code Crim. Proc. Ann. art. 817 (1967)).[9] Consistently with this

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7/ Cont'd.

with the consent of the district attorney, may plead 'guilty without capital punishment.'"

8/ This Court and the Supreme Court of Louisiana had vacated or reversed numerous death sentences imposed under the State's pre-Furman procedure. See, e.g., Sinclair v. Louisiana, 408 U.S. 939, on remand sub nom. State v. Sinclair, 263 La. 377, 268 So.2d 514 (1972); Poland v. Louisiana, 408 U.S. 936, on remand sub nom. State v. Poland, 263 La. 269, 268 So.2d 221 (1972); Singleton v. Louisiana, 408 U.S. 932, on remand sub nom. State v. Singleton, 263 La. 267, 269 So.2d 220 (1972); Williams v. Louisiana, 408 U.S. 934, on remand sub nom. State v. Williams, 263 La. 284, 268 So.2d 227 (1972); Square v. Louisiana, 408 U.S. 938, on remand sub nom. State v. Square, 263 La. 291, 268 So.2d 229 (1972); Douglas v. Louisiana, 408 U.S. 937, on remand sub nom. State v. Douglas, 263 La. 294, 268 So.2d 231 (1972); McAllister v. Louisiana, 408 U.S. 934, on remand sub nom. State v. McAllister, 263 La. 296, 268 So.2d 231 (1972); Strong v. Louisiana, 408 U.S. 937, on remand sub nom. State v. Strong, 263 La. 298, 268 So.2d 232 (1972); Marks v. Louisiana, 408 U.S. 933, on remand sub nom. State v. Marks, 263 La. 335, 268 So.2d 253 (1972); State v. Franklin, 263 La. 344, 268 So.2d 249 (1972); State v. Hayes, 271 So.2d 525 (La. 1973); State v. McCauley, 272 So.2d 335 (La. 1973); State v. Curry, 263 La. 997, 270 So.2d 484 (1972); State v. Jones, 263 La. 1012, 270 So.2d 489 (1972); State v. Refuge, 270 So.2d 842 (La. 1972); State v. Quinn, 288 So.2d 605 (La. 1974).

9/ At the time of Furman, article 817 provided:

> "In a capital case the jury may qualify its verdict of guilty with the addition of the words 'without capital punishment' in which case the punishment shall be imprisonment at hard labor for life.
>
> In noncapital cases, any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

After the 1973 amendment, article 817, La. Code Crim. Proc. Ann. (1974 supp.) provides:

> "Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

modification, the legislature deleted the verdict "Guilty without capital punishment," see art. 814, La. Code Crim. Proc. Ann. (1967), as a "responsive verdict" in cases where the jury is instructed on one of Louisiana's capital crimes.[10/] La. Acts 1973, Act 126 (amending art. 814). The effect of these and related amendments is to retain the following "responsive verdicts" upon which the jury must be instructed, see pp. 31-41, infra:

> On a first degree murder charge -- Guilty, Guilty of second degree murder, Guilty of manslaughter, Not guilty (art. 814(A)(1), La. Code Crim. Proc. Ann. (1974 supp.));
>
> On an aggravated rape charge -- Guilty, Guilty of attempted aggravated rape, Guilty of simple rape, Not guilty (art. 814 (A)(8), La. Code Crim. Proc. Ann. (1974 supp.));
>
> On an aggravated kidnapping charge -- Guilty, Guilty of simple kidnapping, Not guilty (art. 814(A)(16), La. Code Crim.Proc. Ann. (1974 supp.)).

Trial procedures in capital cases were not otherwise altered.

10/ In addition to the capital crimes of first degree murder (La. Rev. Stat. Ann. §14:30 (1974)), aggravated rape (La. Rev. Stat. Ann. §14:42 (1974)) and aggravated kidnapping (La. Rev. Stat. Ann. §14:44 (1974)), Louisiana provides a death penalty for the crime of treason:

> "Treason is the levying of war against the United States or the State of Louisiana, adhering to enemies of the United States or of the State of Louisiana, or giving such enemies aid and comfort.
>
> No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on his own confession in open court.
>
> Whoever commits the crime of treason shall be punished by death."

La. Rev. Stat. Ann. §14:113 (1974). The crime of treason is not

Since petitioner was indicted on two counts of aggravated rape,[11] his jury was instructed, pursuant to art. 814(A)(8), that it could find him guilty of aggravated rape, guilty of simple rape, guilty of attempted aggravated rape, or not guilty. He was found guilty of aggravated rape on both counts, and a death sentence was imposed. On his appeal, the Louisiana Supreme Court considered the question of "whether the said [1973] amendments removed the infirmities in our law which precluded the imposition of the death penalty for aggravated rape in Louisiana since Furman v. Georgia. In other words, is the death penalty for aggravated rape presently constitutionally permissible?" State

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10/ cont'd.

one for which "responsive verdicts" are defined in art. 814, La. Code Crim. Proc. Ann. (1974 supp.). Louisiana Code of Criminal Procedure Annotated article 815 (1967) provides:

> "In all cases not provided for in Article 814, the following verdicts are responsive:
>
> (1) Guilty;
> (2) Guilty of a lesser and included grade of the offense even though the offense charged is a felony, and the lesser offense a misdemeanor; or
> (3) Not Guilty."

11/ Although the class of capitally punishable homicides was significantly narrowed by the 1973 Louisiana capital punishment legislation through the division of "murder" into two degrees, see note 7, supra, the definitions of aggravated rape, simple rape, and attempt, see pp.3-4 supra, were not altered in any way.

v. Selman, 300 So.2d 467, 472 (La. 1974), App. A at 6a. The Court answered this question -- with two Justices dissenting -- by ruling "that the death penalty for aggravated rape is not per se cruel and unusual punishment," ibid., and that the 1973 amendments removed the constitutional infirmities specifically condemned by Furman v. Georgia:

> "[a]s we read the various concurring opinions in . . . [Furman v. Georgia], we consider the primary objection to the death penalty was in its administration, wherein it left to the uncontrolled discretion of judges or juries the determination whether defendants committing certain crimes should die or be imprisoned. It was this uncontrolled discretion in the imposition of the death penalty by the judges or juries for a particular offense which created a violation of the Eighth and Fourteenth Amendments to the United States Constitution.
>
> . . . .
>
> [W]e find no substance in the argument that by permitting a jury to render responsive verdicts, there still remains in the jury the uncontrolled discretion to impose the death penalty. The responsive verdicts for aggravated rape are as follows: guilty, guilty of attempted aggravated rape, guilty of simple rape, not guilty. The reason for this argument lacking merit is that the jury has no discretion in the imposition of the death penalty for aggravated rape. If the jury finds under the facts of the case that the accused is guilty of aggravated rape, the death penalty shall be imposed. On the other hand, if the jury finds under the facts of the case that the accused is either guilty of attempted aggravated rape or simple rape, they will render a verdict of guilty for that particular crime. We must bear in mind that attempted aggravated rape and simple rape are separate and distinct crimes with separate penalty provisions for each. The fact that death is the mandatory penalty for aggravated rape but not for the responsive verdicts of attempted aggravated rape and simple rape is of no moment. The sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty, if any. Therefore, we conclude

that there is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of aggravated rape."

State v. Selman, supra, 300 So.2d at 472-473, App. A at 6a-7a.

This decision presents issues of sober significance not only for petitioner and the over sixteen defendants[12/] thus far condemned under the 1973 Louisiana capital punishment legislation, but also for the viability of the constitutional principles applied in Furman. Certiorari is appropriate here to consider three distinct grounds upon which petitioner urges that his death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

12/ State v. Larry Calloway, Orleans Parish Dist. Ct., No. 244,393 (D) (November 14, 1974) (first degree murder); State v. Billy Monroe, Orleans Parish Dist. Ct., Nos. 243,325 & 243,326 (November 4, 1974) (aggravated rape); State v. Harry Roberts, Orleans Parish Dist. Ct. No. 241,775 (C) (September 19, 1971) (aggravated rape); State v. Robert Leonard, Orleans Parish Dist. Ct. No. 74,132 (July 18, 1974) (aggravated rape); State v. Lawrence Watts, St. Mary's Dist. Ct., No. 74,132 (July 15, 1974) (aggravated rape); State v. Herbert Nicholson, Orleans Parish Dist.Ct., No. 238,379, (June 28, 1974) (aggravated rape); State v. Charles Bryant, Ouachita Parish Dist. Ct., No. 36,038 (June 27, 1974) (aggravated rape); State v. Johnson Washington, St. Charles Parish Dist. Ct., No. 30,762 (February 7, 1974) (first degree murder); State v. Billy Dillard, East Carroll Parish Dist. Ct., No. 12,736 (February 23, 1971) (first degree murder); State v. Sheldon Batiste & Aaron Thomas, St. Landrey Parish Dist. Ct., No. 26852 (October 9, 1970) (first degree murder); State v. Eddy Foreman, East Baton Rouge Parish Dist. Ct., No. 65,685 (October 10, 1969) (first degree murder); State v. Roy Mejia, East Baton Rouge Parish Dist. Ct., No. 57,774 (November 2, 1967) (first degree murder); State v. Joseph Gleason, (received at Louisiana State Prison on October 21, 1974) (sentenced in Orleans Parish for aggravated rape); State v. Parnell Smith, (received at Louisiana State Prison on May 28, 1974) (sentenced in West Feliciana Parish for first degree murder); State v. Gregory England, (received at Louisiana State Prison on May 30, 1974) (sentenced in Jefferson Parish for first degree murder).

A. The Perpetuation of Arbitrary Selectivity under the New Louisiana Capital Punishment Procedure.

The decision of the Louisiana Supreme Court warrants review insofar as that Court held that Louisiana's 1973 statutory modifications satisfied the minimum requirement of Furman v. Georgia: that the penalty of death not be imposed arbitrarily.[13/] For numerous uncontrolled selective mechanisms continue to operate before, during and after the sentencing of defendants charged with capital crimes in Louisiana, combining to produce a wanton and irregular infliction of the most extreme penalty known to contemporary society with "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, supra, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

13/ The questions presented by sections I(B) and I(C) of this petition, p. 44 infra, draw upon broader implications of the Furman decision than the minimum requirement of non-arbitrariness stated in the text here. As section I(A) demonstrates, however, Louisiana's present capital punishment procedure so clearly violates that minimum requirement as to render consideration of the broader implications of Furman unnecessary for the disposition of the case.

1. Prosecutorial Discretion

Article 61 of the Louisiana Code of Criminal Procedure Annotated (1967) provides that, subject to the limited supervision of the attorney general, "the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute." The Louisiana Supreme Court has reiterated that "[i]t is within the exclusive province of the district attorney, who is vested with full charge and control of every criminal prosecution instituted or pending in any parish where he is district attorney, to determine whom, when and how he shall prosecute." State v. Collins, 242 La. 704, 138 So.2d 546, 550 (1962). See also State v. Jourdain, 225 La. 1030, 74 So.2d 203, 204 (1954); Kemp v. Stanley, 204 La. 110, 15 So.2d 1, 20 (1943) (on rehearing); State ex rel. Bourg v. Marrero, 132 La. 109, 61 So. 136, 143-144 (1913); Pier 1 Imports, Inc. v. Pitcher, 270 So.2d 228, 229-230 (La. App. 1972). And in recognizing the unreviewable discretion of the district attorney to initiate civil nuisance abatement suits, the Louisiana Court of Appeals reasoned from the settled criminal jurisprudence of the State:

> "[i]n a civil action such as this, a district attorney certainly has no lesser latitude of discretion to determine when he shall bring the action to abate and to control the proceedings than in any criminal case. We do not agree with the contention of defendant's counsel that it was necessary that the legislature set forth 'any criterion or rules or standards' under which the District Attorney will proceed."

Langridge v. Gassenberger, 183 So.2d 411, 413 (La. App. 1966). The decisions whether and when it is appropriate to seek and prosecute a capital aggravated rape indictment -- or whether and

when it is appropriate to proceed upon available lesser charges -- thus are committed to the unfettered discretion of the district attorney.

The district attorney also has unrestricted freedom to terminate criminal prosecutions. Article 691, of the Louisiana Code of Criminal Procedure Annotated (1967) provides:

> "[t]he district attorney has the power, in his discretion, to dismiss an indictment or a count in an indictment, and in order to exercise that power it is not necessary that he obtain consent of the court."

This broad power has been frequently recognized. The Louisiana Supreme Court has held, for example, that a trial judge has no power to require a district attorney to file a statement of reasons when he enters a nolle prosequi:

> "[t]here can be no doubt, of course, that the attorney general and the district attorneys of the State have absolute discretion to nolle prosequi any criminal case . . . [S]uch right has invariably been endorsed by the decisions of this Court. The broad powers vested in the district attorneys have long been recognized in our adjudications prior to the inclusion of . . . [Article 691] in our Code of Criminal Procedure . . . .'In all stages of a criminal prosecution before a jury is impanelled the prosecuting attorney has an arbitrary control over his indictments, and may enter a nolle prosequi as to them, at pleasure, without the consent of the court or of accused.'"

City of Lake Charles v. Anderson, 248 La. 787, 182 So.2d 70, 71 (1966) (quoting MARR, CRIMINAL JURISPRUDENCE OF LOUISIANA 804 (1906)).[14/] See also State v. Hingle, 242 La. 844, 139 So.2d 205,

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14/ If a jury has been impanelled, however, a district attorney must secure the consent of the defendant before he dismisses an indictment. State v. Bracklin, 113 La. 879, 37 So. 863 (1905).

206 (1962)(on rehearing); State v. Broussard, 217 La. 90, 46 So.2d 48, 50 (1950); State v. Kavanaugh, 203 La. 1, 13 So.2d 366, 373 (1943).

Thus, without any statutory guidance or judicial control, a district attorney is free to elect to charge aggravated rape or some lesser, non-capital offense on the same set of facts. This discretion is absolute and will inevitably result in an uncertain and inconsistent selection of defendants to be prosecuted on capital charges. As we demonstrate at pp.31-41, infra, the legal definitions setting off the capital crime from lesser ones are amorphous and opaque and their application to specific factual situations is (as the present case amply illustrates) largely conjectural. We have no doubt that some measure of charging discretion must always be left in a prosecutor's hands; but where the death penalty is a possible consequence of judgments made in the exercise of that discretion, the minimal requirement of the Eighth Amendment as construed in Furman should surely be that the State must take all practicable steps to control and regulate such judgments so as to assure against the arbitrary selection of some men to die while others in like factual circumstances are permitted to live. In Louisiana, there is absolutely no regularization of the prosecutor's selection among largely overlapping capital and non-capital charges, and a district attorney may act "arbitrarily" in an Eighth Amendment sense without violating any legal duty.

2. Plea Bargaining

Although art. 557 of the Louisiana Code of Criminal Procedure Annotated (1974 supp.) prohibits the entry of a guilty plea to a capital charge,[15/] article 558 (1967) provides that:

> "[t]he defendant, with the consent of the district attorney, may plead guilty of a lesser offense that is included in the offense charged in the indictment."

And article 487(B)(1974 supp.), enacted in 1970, allows a defendant to plead guilty to an even broader range of offenses in exchange for the dismissal of an indictment; it provides that the defendant may enter "a plea of guilty to a crime nonresponsive to the original indictment when such a plea is acceptable to the district attorney, and in such case, the district attorney shall not be required to file a new indictment to charge the crime to which the plea is offered." State v. Green, 269 So.2d 460 (La. 1972), construed articles 558 and 487(B) together to decree that a guilty plea is valid if it is voluntarily entered to a lesser offense "of the same generic class," 269 So.2d at 462, as that charged in the indictment, although the lesser crime is not one that would have to be submitted as a "responsive

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15/ Article 557 provides: "A court shall not receive an unqualified plea of guilty in a capital case. If a defendant makes such a plea, the court shall order a plea of not guilty entered for him."

verdict" under article 814 at a jury trial:

> "[t]he limitations on verdicts which may be applicable to a trial are not entirely pertinent to a guilty plea . . . Generally, no limitation is imposed on the guilty pleas which may be entered to a pending charge, except the requirement that the plea be to a lesser offense, and that the lesser included offense be of the same generic class, not requiring proof of any element not found in the major crime charged."

Id. at 463.

The Louisiana Supreme Court has also approved the practice of plea bargaining and has recognized that a "defendant may validly have entered a guilty plea, guilty or not, because of other considerations." State v. Riley, 284 So.2d 557, 558 (La. 1973). Although a district attorney must secure the agreement of the trial court to a sentencing bargain,[16/] he has unfettered power to charge-bargain -- that is, to agree to accept a guilty plea to a lesser offense. In the case of a defendant indicted for aggravated rape, the prosecutor may accept a plea to simple rape, attempted aggravated rape, or an assault charge. On the appeal of a defendant convicted of a narcotics violation, the Supreme Court of Louisiana ruled that the prosecutor was not obligated to have reduced the charge or to have offered appellant immunity simply because codefendants had received such treatment: "The matter of the prosecution of any criminal case is within the entire control of the district attorney . . . and the fact

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16/ "[A]greements made solely by a prosecuting attorney granting immunity from sentence or assurance concerning the extent of a sentence are unenforceable and do not bar subsequent action by the court. Such agreements gain vitality only when the judge becomes a party." State v. Hinglo, 242 La. 844, 139 So.2d 205, 206 (1962) (on rehearing).

that not every law violator has been prosecuted is of no concern of appellant." State v. Jourdain, 225 La. 1030, 74 So.2d 203, 204-205 (1954).

The existence of plea bargaining is pervasive in the criminal justice system: guilty pleas are said to account for up to ninety per cent of all criminal convictions. 17/ Since the harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error, capital cases are particularly likely to involve plea bargaining:

> "'[s]ince time immemorial [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a . . . [capital] trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an appellate court.'" 18/

17/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

18/ Bedau, Death Sentences in New Jersey 1907-1960, 19 RUTGERS L. REV. 1, 30 (1963) (quoting opinion of Judge C. Conrad Schneider, State v. Faison, No. 5-550-57, Bergen Cty. Ct., Nov. 21, 1958).

"A promise by the prosecutor of sentence leniency or a charge reduction as a concession for a plea of guilty is a major characteristic of the negotiated plea process." 19/ And an ostensibly "mandatory" death penalty statute is particularly likely to produce guilty pleas to lesser included offenses, since "[m]any prosecutors and judges . . . support the practice as both necessary and desirable . . . to achieve sentencing flexibility which would sometimes be prevented by mandatory sentences." 20/ Many prosecutors

> "declare without hesitation that one of their goals in the [plea] bargaining process is to nullify harsh, 'unrealistic' penalties that legislators have prescribed for certain crimes." 21/

Prosecutorial "nullification" of this sort is manifestly invited by the wide range of offenses which La. Rev. Stat. Ann. §14:42 (1974) describes as aggravated rape. See pp.31-41, infra.

It is inescapable, therefore, that in the absence of any standards or procedures which regularize the practices of district attorneys in accepting guilty pleas to lesser charges, some defendants indicted for aggravated rape will escape with sentences less harsh than death while others are eventually consigned to die for indistinguishable offenses upon unaccountable grounds.

19/ NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 29 (1966).

20/ Id. at 102.

21/ Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U.CHI. L. REV. 50, 54 (1966).

4. Executive Clemency

Article 5, section 10, of the Louisiana Constitution provides:

> "[t]he governor shall have power to grant reprieves for all offenses against the state; and may, except in cases of impeachment, or treason, upon the recommendation in writing of the lieutenant governor, attorney general, and presiding judge of the court before which the conviction was had, or any two of them, grant pardons, commute sentences, and remit fines and forfeitures. . . ."

The governor's discretion to spare the lives of condemned felons, upon proper recommendation, is nearly total.

> "The only limitation on the Governor's commutation power is that he act pursuant to a written recommendation of commutation signed by any two of the following: the lieutenant governor, the attorney general and the presiding judge of the court before which the conviction was obtained. Once this recommendation is received, the Governor has unlimited discretionary power to commute an applicant's sentence."

Gaillard v. Cronvich, 263 La. 750, 269 So.2d 231, 232 (1972). See also State v. Ramsey, 292 So.2d 708, 710 (La. 1974); State v. Melerine, 238 La. 847, 116 So.2d 689 (1959); State v. Trist, 238 La. 853, 116 So.2d 691, 697 (1950). And, of course, the discretion of the lieutenant governor, attorney general, and/or presiding judge to make or decline to make written recommendations is equally unbounded. The clemency process is effectively immune from judicial review.

The inevitable result of this Louisiana system of commutation is that an arbitrarily selected number of those convicted of like crimes will be put to death. The chief executive and

those who forward recommendations to him are bound by no criteria for deciding which among the condemned shall live or die. Their decisions are unexplained and inscrutable. Standards for reviewing clemency applications may vary greatly as officeholders are replaced -- or there may be no standards at all -- though life and death hang in the balance.

This analysis of Louisiana's post-Furman capital punishment procedures demonstrates that the arbitrary selectivity condemned in Furman has been perpetuated notwithstanding formal statutory amendments. Discretionary opportunities for imposition or avoidance of the death penalty are, in fact, as numerous and as unregulated as in the pre-June 29, 1972, period. A substantial question of literally vital importance to petitioner is thus presented by the Louisiana Supreme Court's affirmance of his death sentence under the new Louisiana statutory scheme.

Appendix C

Selected pages of jury selection transcript showing exclusion for cause of fourteen veniremen at petitioner's trial on account of conscientious scruples against capital punishment.

of law that I just explained to you that the fact of an indictment is no evidence of guilt whatsoever? Can all of you accept that?

Mr. Hogan, you indicated that you had some doubts about that?

MR. HOGAN:

Yes, sir.

Q: Sir?

A: Yes, sir.

Q: Would you explain to us what your doubts are?

A: Well, I know that under our system of justice in America he is innocent until proven guilty and yet sometimes it gets fixed in our mind that...

Q: Well, do you have at this time a fixed opinion as to the guilt of Johnson Washington, Jr., guilt or innocence?

A: No, I suppose not.

Q: You do not?

A: I suppose not.

Q: All right. Then I take it, Mr. Hogan, that if you were chosen on this jury you could do as the law requires and consider only the evidence that you hear from that witness chair and the law as this court will charge you the law in arriving at a verdict. Could you do that?

A: Yes, sir.

MR. SMITH: [VENIREMAN MONROE DOUGLAS]

Now, gentlemen, I have told you that this accused stands

charged with the crime of first degree murder. Under our law that is known or commonly known as a capital case which means that a verdict of guilty of first degree murder necessarily... this court has no discretion... necessarily carries the death penalty. Now, do any of you gentlemen have any religious, conscientious or moral scruples against the infliction of the death penalty to such a degree that you would not even consider a verdict of guilty knowing it would carry the death penalty regardless of what the evidence showed?

Mr. Douglas?

MR. DOUGLAS:

Yes, sir.

Q: Do you have any moral or religious scruples against the infliction of the death penalty?

A: Well, that's kind of a hard question.

Q: It's a hard business.

A: Now, it tends into that.

Q: I'm sorry, I can't hear you very well.

A: It tends into that and what's been done about it.

Q: Well, I'm asking you, sir, if you were convinced of the guilt of an accused beyond any reasonable doubt, any accused who was charged with a capital crime, could you consider a verdict of guilty knowing that it would carry the death penalty or are your scruples against the death penalty so strong that you wouldn't even consider that? That's what I'm

asking you.

A: I wouldn't want to put a fellow to death.

Q: Are you telling me then, sir, that regardless, if you were chosen on this jury, that regardless of what the evidence from that witness chair showed that you would not even consider a verdict of guilty knowing that it would carry the death penalty?

A: See, my bible tells me,"Thou shalt not kill." I'm a Baptist.

Q: Yes, sir, but I would like for you to answer my question yes or no. Would you under any circumstances ever vote for the death penalty?

A: No, sir, I don't think I would.

Q: That is, regardless of what the evidence from this witness chair may show, you would not vote for a verdict that would necessarily carry the death penalty?

A: No, sir, I don't think so.

MR. SMITH:

Your honor, I'm going to tender him... if the court has any questions... for cause.

COURT:

No questions.

MR. BEZOU: [sic]

I tender him for cause... challenge him for cause.

COURT:

Mr. Douglas, you're excused with our thanks. Thank you, sir. Mr. Douglas, the court is going to advise that you are not allowed to discuss what was talked

about in this room until this case is over, sir. Thank you.

MR. DOUGLAS:

Thank you, sir.

(MR. DOUGLAS LEAVES COURTROOM)

MR. SMITH:

Mr. Hogan.

MR. HOGAN:

Yes, sir.

Q: Do you have any such scruples or religious morals against that?

A: No.

Q: In other words, in a proper case you could render a verdict knowing that it would carry the death penalty?

A: Yes, sir.

MR. SMITH:

Mr. Faucheaux, do you have any religious scruples against the death penalty?

MR. FAUCHEAUX:

No, sir.

MR. SMITH:

I take it... how about you, Mr. Madere?

MR. MADERE:

No, sir.

[VENIREMAN HAROLD E. CROW]

MR. SMITH:

Mr. Crow?

MR. CROW:

Well, I think I would be real hesitant about it.

Q: Well, now, you really didn't answer that question. All of us might be hesitant. If you were chosen as a juror, sir, you would take an oath to perform your duty. I'll phrase the question to you as I phrased it to Mr. Douglas. Are you telling me, sir, that while you have these scruples, that regardless of what the evidence showed from the witness chair, that you would never under any circumstances vote for a verdict knowing that that verdict would necessarily carry the death penalty?

A: I don't believe I would.

MR. BEZOU:

Your honor, if I may, at this point, I'm going to request that the State in questioning this witness, track the language of Article 798 which, in fact, tracks the language of Footnote 21 of the Witherspoon case which lays the criteria for the situation so we can get an accurate determination under the jurisprudence.

MR. SMITH:

Your honor, I don't know that it's necessary that I track any Article in my questions as long as I get the point across to satisfy this court as to the qualifications of this juror with regard to the death penalty. I know of no law that says I have to track any statute. I have covered everything in

that statute.

COURT:

Your objection is vague, Mr. Bezou. What specifically do you have reference to in the statute?

MR. BEZOU:

Your honor, actually the language reads that there are two criteria in the alternative. A says that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial in the case before him or that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt. I suggest that the language that the State is using is different than that, is much more definite than that and does not include the second alternative. So that's why I ask the State to track his language according to the Statute. That's my request, your honor.

MR. SMITH:

Your honor, if I may be heard. If I don't clarify it on the first grounds, I may go to the second grounds and clarify it.

MR. BEZOU:

Because the inference here is that any scruples are sufficient and that's not the law.

MR. SMITH:

Your honor, that's not what I asked this man. I asked

this man if his scruples were so strong that regardless of what the evidence showed from that witness chair he would refuse to vote a verdict that he knew would necessarily carry the death penalty. Now if that's not word for word from that statute and that's not what it says, then I can't read and I know of no law...

COURT:

Mr. Bezou, I'm groping but your basic argument... I agree fully with it. I believe the State does, too. But I don't see any reason why he should verbatim follow the statute because a layman might not understand it as easily as the language that Mr. Smith is using now.

MR. BEZOU:

Your honor, maybe I'm getting a different impression from what he's saying than what I interpret the statute to read and I would want it to be as close as possible because I know this is very important.

COURT:

All right, the State is instructed to follow the statute as closely as possible.

MR. SMITH:

Your honor, it's very simple. I just merely want to know from the juror if regardless of what the evidence showed, would he refuse to vote for a verdict knowing it would carry the death penalty.

COURT:

OK. Proceed, Mr. Smith.

MR. SMITH:

Would you answer that question?

MR. CROW:

I don't think I could vote for the death penalty.

Q: Under any circumstances? Regardless of what the evidence showed from that witness chair?

A: No, sir.

MR. SMITH:

Your honor, I submit him if the court wants to question him any further.

COURT:

I think he's satisfied.

MR. BEZOU:

Yes, sir.

COURT:

Mr. Crow, you're excused with our thanks.

(MR. CROW LEAVES COURTROOM)

MR. SMITH:

I take it that the rest of you gentlemen, by your answers, in a proper case, where you were convinced of the guilt of the accused beyond a reasonable doubt could render a verdict knowing it would carry the death penalty?

JURORS:

(Indicate yes)

and you were under oath when you sat in the jury box to tell the truth. You understand that?

MR. HILL:

Yes, sir.

COURT:

It's my understanding of the conversation with you immediately preceding our noon recess when you advised me in the presence of the attorneys here that you feel at this time that you cannot sit on this case knowing that a guilty verdict would require the death penalty for the defendant?

MR. HILL:

I don't think I could vote to take a man's life, no, sir. A life sentence, maybe, or something like that.

COURT:

And I understand it's your position now that when you were questioned prior to being sworn in as a juror that you did not understand the questions of counsel and the questions of the court concerning capital punishment?

MR. HILL:

Well, it was... I was under the impression that capital punishment was life imprisonment. I didn't think...

MR. HILL:

Well, I thought that's what it meant.

COURT:

All right. Mr. Bezou, do you have any questions to ask

this witness... this juror?

MR. BEZOU:

No, sir.

COURT:

No questions?

MR. BEZOU:

No, sir.

COURT:

It is the ruling of this court that the situation we find ourselves in now is governed by Article 796, that the court may at any time before the first witness is sworn in order a juror removed if it is found even after being sworn in that he is incompetent to serve. Incompetence denotes not qualified as outlined under Article 401 but rather a lack of ability or fitness with which to discharge his duties as a juror. Therefore, I will allow the challenge by the State for cause and excuse this juror.

MR. BEZOU:

To which ruling I shall respectfully reserve a bill of exceptions making a part thereto the challenge for cause by the State of this juror, Mr. Steve Hill, the objection by defense to his removal, the ruling of this court removing this juror pursuant to Article 796 of the Code of Criminal Procedure, the testimony adduced from Mr. Hill, the synopsis of the testimony given to the court and the

the infliction of the death penalty to such a degree that you would not even consider a verdict of guilty regardless of what the evidence may indicate or show?

Mr. Williams, do you have any such religious, moral or conscientious scruples against the infliction of the death penalty?

MR. WILLIAMS:

No.

Q: You do not?

A: No.

Q: You could return a verdict of guilty knowing that that verdict would necessarily carry the penalty of death by electrocution?

A: Well, I couldn't say because I haven't heard all of the evidence.

Q: No, sir, I'm not speaking about this case. I'm talking about do you have any particular scruples or any strong feelings against the death penalty that would prevent you from even considering imposing the death penalty in any case?

A: Yes, I have some. Say, for instance, this man he killed one man, what's the use in killing him, you know. I mean, you could just, say, like lock him up, say for a length of time.

Q: Does this feeling that you have about this case, and I assume that would apply to any case, is that right?

A: Yes.

Q: Not only this case but any case, is that right?

A: Yes.

Q: This feeling that you have, Mr. Williams, is it so strong in your mind that regardless of what the evidence from this witness chair showed, that you, personally, could never vote for a verdict knowing that such a verdict would send a man to the electric chair? Is that correct, sir?

A: (Indicates yes)

Q: Is that correct?

A: Yes, sir.

MR. BEZOU:

Your honor, if I may at this point interject, I would ask to clarify the issue if counsel would and I believe that yesterday counsel was instructed to track the language, if possible, of Article 798 and ask if the man would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed in the trial in the case before him. If he could phrase it that way I think it would solve a lot of problems.

MR. SMITH:

Your honor, I'm just not going to let this man tell me how to run my case.

COURT:

I see no objection to the manner in which he is phrasing it now, Mr. Bezou. In fact, if either side isn't very, very clear on this one point, the court is

going to go into it, too, in view of the experience we just had. I don't want to leave any doubt in anyone's mind.

MR. SMITH:

And properly so, your honor.

Mr. Williams, I take it that that is your feeling that you just expressed. Is that right?

MR. WILLIAMS:

Yes.

MR. SMITH:

Mr. Grice, do you have any such scruples?

MR. GRICE:

Not against the death penalty.

MR. SMITH: [VENIREMAN RONALD L. BROWN]

Mr. Brown?

MR. BROWN:

I don't know.

Q: Sir?

A: I couldn't honestly say.

Q: Well, you will have to give an answer one way or the other, Mr. Brown. I take it that you have some scruples against the death penalty?

A: Yes, sir.

Q: Let me phrase it to you this way: Are these feelings that you have against the infliction of the death penalty so strong...

A: I guess so.

Q: ...that you would not even... let me finish my question...

that you would not even consider a verdict, rendering a verdict or voting for a verdict, that would necessarily carry that death penalty if you knew that the verdict that you voted for would necessarily carry the death penalty, which this one does if he is voted guilty of first degree murder necessarily carries the death penalty by electrocution. Would you refuse to even consider that verdict, the imposition of that verdict, or voting for that verdict regardless of what the evidence from that witness chair showed?

A: No, sir. I don't think.

Q: Would you explain what you mean by that, sir. "I don't think." You don't think what?

A: I guess if the evidence is strong enough, you know, I guess I would vote against him.

Q: I can't hear you, sir. Explain it again.

A: I said if the evidence was strong enough, I reckon I would.

Q: You could vote guilty knowing it would carry the death penalty?

A: Yes, sir.

[VENIREMAN ROY A. MONGRUE]

MR. SMITH:

Mr. Mongrue, what is your feeling about that?

MR. MONGRUE:

In good conscience, sir, I couldn't vote for somebody to die. I couldn't. My conscience wouldn't let me vote for that.

Q: Do you say that, Mr. Mongrue, regardless of what the evidence shows from that witness chair? You just feel that whatever it shows, you would not vote for it?

A: I couldn't vote for it, no.

Q: Whatever it shows, you would not vote for a verdict that would necessarily carry...

A: I felt the same way 25 years ago when I was here before.

Q: And you still have those feelings?

A: Yes.

[VENIREMAN JAMES T. BREAUX]

MR. SMITH:

Mr. Breaux?

MR. BREAUX:

I have mixed feelings on it also.

Q: Now, mixed feelings, sir, let's go into it a little further, if we may. What we've got to know, Mr. Breaux... you see, the law sets the penalty for first degree murder. And the penalty set by the law is death by electrocution. And this court, if that verdict is returned, this court has no discretion in the matter. That's the sentence that must be imposed if the verdict of guilty of first degree murder is brought back. Now, knowing that, I ask you this question: Could you vote for such a verdict knowing that it would necessarily carry the death penalty?

A: No, I could not vote that way.

Q: Do you say that regardless of what the evidence showed,

sir?

A: That is correct.

Q: Huh?

A: That is correct.

MR. SMITH:

Mr. Brown?

MR. BROWN:

Can I change my mind?

Q: Yes, sir?

A: I mean I don't want to lie, I mean but I have the same feeling. Just because I just can't make a snap decision, I mean, I can't say, you know...

Q: In other words, you would not vote for the death penalty under any circumstances?

A: That's right.

Q: Regardless of what the evidence might show?

A: Right.

Q: You would just disregard that verdict because of the fact that it carried the death penalty?

A: I can't see...

Q: Regardless of the evidence that's shown from the witness chair?

A: Right.

MR. SMITH:

Mr. Mongrue, I believe you made yourself very clear on that. And Mr. Breaux?

MR. BREAUX:

That's correct.

MR. SMITH:

And Mr. Williams?

MR. WILLIAMS:

Yes, sir.

MR. SMITH:

Your honor, at this time I would submit Mr. Williams...

MR. BEZOU:

Excuse me, Mr. Brown, Mongrue and Breaux. Is that right?

MR. SMITH:

Yes, I'm sorry. Mr. Williams, Mr. Brown, Mr. Mongrue and Mr. Breaux for cause in that they have stated that under no circumstances regardless of the evidence would they even consider bringing in a verdict of guilty knowing that that verdict would carry the death penalty.

COURT:

Mr. Bezou.

MR. BEZOU:

Your honor, maybe I missed something. I certainly heard Mr. Breaux, Mr. Mongrue and Mr. Brown voice that opinion and I would agree with the State that they should be dismissed for cause. However, maybe I didn't hear what Mr. Williams said but I don't recall Mr. Williams saying that he would automatically vote against capital punishment or that under no circumstances could he return a guilty verdict because the death penalty was going to be imposed.

COURT:

My notes say that Mr. Williams said that he objects to the death penalty. Do you want to go through the notes or do you want to...

MR. BEZOU:

I would like an opportunity to question him, if I may?

COURT:

OK. Concentrate on Mr. Williams.

MR. BEZOU:

Mr. Williams, I'll phrase this as follows: Would you automatically vote against the imposition of capital punishment, that is, death, without regard to any evidence that might be developed at the trial of a case before you?

MR. WILLIAMS:

Not without the evidence, no.

Q: But if, in a hypothetical situation, the State proved a case beyond a reasonable doubt in your mind of first degree murder, in a case like that, could you vote guilty knowing that a man would be sent to death?

A: No, I couldn't.

Q: You couldn't under no circumstances?

A: No.

MR. BEZOU:

All right.

COURT:

Mr. Breaux, Mr. Mongrue, Mr. Brown and Mr. Williams, you

are excused. Gentlemen, this court advises that you not... just a minute... this court advises that you not discuss anything that was heard, overheard, questions asked you while you were in this courtroom until after this case is concluded. Thank you.

(MR. BREAUX, MR. MONGRUE, MR. BROWN AND MR. WILLIAMS LEAVE COURTROOM)

COURT:

Are you through with Mr. Grice?

MR. SMITH:

No, sir. I would like to ask him other questions, sir, if I may.

COURT:

OK.

MR. SMITH:

Mr. Grice, are you married?

MR. GRICE:

Yes, sir.

Q: You have a family?

A: Yes, sir.

Q: This is what is known, Mr. Grice, as a sequestered jury. This, in effect, means that if chosen on this jury, you are going to be locked up until the case is over. We have no way of knowing when it will be over. It may be Monday or it may be next Friday. I don't know and have no way of knowing. Is there any reason, hardship or otherwise which would prevent

MR. SMITH:

Mr. Deroche?

MR. DEROCHE:

Yes, sir.

MR. SMITH:

Gentlemen, I told you that this is a capital case, and I told you that this man is charged with having committed the crime of murder in the first degree, first degree murder. Now, under our law a verdict of guilty of first degree murder necessarily carries the death penalty. Death by electrocution. This court has no choice in the matter. The law prescribes that as the penalty. The law sets that out as being the penalty for first degree murder. Now, knowing that I ask... I will phrase a general question that I will ask each of you gentlemen. Knowing that a verdict of guilty of first degree murder necessarily means death by electrocution, do any of you gentlemen have any religious, moral or conscientious scruples against the infliction of the death penalty to such a degree that you would refuse even to consider such a verdict knowing it would carry the death penalty regardless of what the evidence may show from that witness chair? Mr. Deroche, do you have any such scruples?

MR. DEROCHE:

No, sir.

MR. SMITH:

Mr. Carter, do you?

MR. CARTER:

Yes, I do. I don't believe in capital punishment.

MR. SMITH:

Now, Mr. Carter, when you say you don't believe in the death penalty, let me make this... well, let me ask Mr. Morgan. Mr. Morgan, do you have any such scruples?

MR. MORGAN:

No, sir.

MR. SMITH:

Mr. Carter, I will get back to you, sir. Are you telling me, sir, that under no circumstances would you ever vote for a verdict knowing that it would carry the death penalty regardless of what the evidence may show from that witness chair? Is that what you're saying? Is that what you mean or what you feel?

MR. CARTER:

Right. Under no circumstances.

MR. SMITH:

Your honor, I submit that juror for cause at this time.

MR. BEZOU:

Your honor, I will ask him one question and track the language. Are you saying that you would automatically vote against the imposition of death without regard to any evidence that might be developed in this

trial or in any trial?

MR. CARTER:

Well, he's charged with first degree murder. I couldn't care if it was ten counts of first degree murder.

Q: You couldn't under any circumstances vote a man guilty knowing he would be sent to death? Is that what you're saying?

A: That's what I'm saying.

MR. BEZOU:

No further questions, your honor.

COURT:

Mr. Carter is excused. Mr. Carter, you are not to discuss with anyone anything you heard in this courtroom until after this case is concluded. Thank you, sir.

(MR. CARTER LEAVES COURTROOM)

MR. SMITH:

Mr. Deroche, are you married?

MR. DEROCHE:

Yes, sir.

MR. BEZOU:

Your honor, could we take a short recess, a five minute recess?

(DISCUSSION AT BENCH OFF RECORD)

COURT:

Two minute recess.

(RECESS)

MR. WALTER SMITH:

Mr. Smith, let me ask you this specific question.

MR. JAMES SMITH:

Yes, sir.

Q: Mr. Smith, let me ask you this specific question now. You indicated I didn't tell you when I went into this capital business that you had a right to disagree with the law as you sat there then. I believe that's what you told me awhile ago off the record. Is that correct?

A: Yes, sir.

Q: Knowing now that you have a right as a free American citizen to disagree with the law or the consequences or the punishment by the law, I ask you now, sir, do you feel and I will tell you again as you are already aware that this is a capital case, that a verdict of guilty of first degree murder necessarily carries the death penalty by electrocution. Do you have any moral... with this background, do you have any moral, religious or conscientious scruples that would cause you not to even consider rendering such a verdict knowing that it would carry the penalty of death by electrocution regardless of what the evidence showed?

A: I would reply to that that I feel that the death penalty is not, in itself, is not basically wrong. I believe it's even necessary in many cases. My main objection is that I am not sure that the degree

of guilt that I would require to sentence a man to death is suitable under the terms as the court would present them.

Q: Then I will go a step further with you, sir. The testimony, as this court will instruct you, for arriving at a verdict is that you be convinced from the evidence that you hear of the guilt of an accused byond a reasonable doubt. Not to an absolute certainty but beyond a reasonable doubt. Now, an absolute certainty, sir, implies no doubt at all. And the test under the law is that you be convinced, that in order to convict and that if you are convinced to this degree beyond a reasonable doubt then the law requires that you convict. If you have a reasonable doubt the law requires that you acquit him. Do you understand that?

A: (Indicates yes)

Q: But I would tell you now that a reasonable doubt, as the court will charge you later, is a serious, substantial doubt arising either from the evidence or the lack of evidence. It's not a mere possible doubt. It's not a doubt engendered by sympathy for the accused. It's a serious, sensible doubt, one that you would rely upon in the course of your important everyday affairs. Now, I ask you this: Would you require the State, in order to bring back a verdict of guilty knowing that such a verdict would carry the death penalty or death by electrocution, would

you require the State to present proof beyond a reasonable doubt, what the law requires? In other words, would you require the State to convince you of the guilt of this accused to an absolute certainty beyond any doubt before you would vote for a verdict knowing that it would carry the death penalty?

A: This was the main reason that I asked to be heard again. I have stated before that I would try my best to uphold all the laws of this land. Now, I understand the law to be that I have to be convinced of the man's guilt beyond any reasonable doubt. OK. As I stated before, these are terms that I'm not used to... I'm not used to speaking in these terms of relativity. I would have to state at this time that for me to pronounce the guilty sentence or the guilty verdict, I'm sorry, I would have to be convinced... there would have to be no doubt in my mind. I couldn't convict that man if there was the slightest possible chance that he may be innocent. Now, here once again, we're talking about relative terms and I'm not sure in my own mind what these terms would be. But I will, once again, say that the degree that you would have to prove this case to me would probably be greater than the other jurors.

Q: In other words, are you telling us, sir, that you would have to be convinced to an absolute certainty?

A: Here, again, we're talking in a term that I do not

understand. What I'm saying is that I would have to be convinced there could be no way in my mind that I could even conceive of the man being innocent and give him a guilty verdict. Now, here, I think that we're talking on two levels. I think that your definition of reasonable doubt is more liberal than my definition of reasonable doubt. This is the main reason I wanted to have this reviewed.

Q: May I ask you this question: Are you familiar with the term, "certainty" - if you are convinced to a certainty - are you familiar with that term? You know the general meaning of the term "certainty?"

A: Yes, I know the general meaning of the word "certainty."

Q: And you know the meaning of the word "absolute," meaning complete,beyond any doubt?

A: I find that those two words are very, very close to meaning the same in my mind.

Q: What two words?

A: Certainty and absolute.

Q: Yes, sir. And is that what you're telling me... that you would have to be absolutely certain of the guilt of this accused before you could render a verdict knowing it would carry the death penalty? That if you had any doubt at all, however slight...

A: If I had any doubt at all, however slight, I will not say however slight, I could not give a guilty verdict.

Q: However slight, is that correct?

A: I will not say however slight. If I had any doubt whatsoever... I won't say "however slight" because here agin we're talking under this relative term that I cannot define.

Q: Unfortunately, sir, these are the terms we have to use.

A: Yes, sir, I realize that.

Q: Sir, the question just boils down to this really. The court is going to charge you in much the same terms. It's going to relative. Can you accept that and do you feel that you could, if you were convinced beyond a reasonable doubt of the guilt of this accused, bring in a verdict of guilty knowing it would carry the death penalty? It boils down to that. Now, we can talk semantics all day but what it boils down to is can you or can't you?

COURT:

Knowing that that is the law of the land?

MR. WALTER SMITH:

Knowing that that is the law of the land.

MR. JAMES SMITH:

I realize that that is the law of the land, and I cannot honestly say that I would be able to do that. The meaning of human life is much too precious to me for me to tak it from a person without extremely... extreme certainty.

Q: In other words, you are saying, sir, and I don't want to put words in your mouth, if you had any doubt at all...

MR. BEZOU:

I'm going to object to the question. That's not exactly what he said. He's saying...

MR. WALTER SMITH:

Let me just ask him, if he had any doubt at all... if you had any doubt at all you could not return a verdict knowing it would carry the death penalty?

MR. JAMES SMITH:

I'm afraid I would have to take that stand, yes, sir.

MR. WALTER SMITH:

I submit him.

COURT:

Mr. Bezou.

MR. BEZOU:

Mr. Smith, is what you're saying and listen to this question very carefully, is what you're saying that you would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed during the trial before you?

MR. JAMES SMITH:

No. I will say again that I believe capital punishment is a necessity. I will also say that I have always, as far as I can remember, believed capital punishment to be a necessity. I will say that up until yesterday I have always considered myself capable of giving a guilty verdict in a capital punishment case and I still feel that I could do this. However,

I will say that the amount of stress that these thoughts have placed upon me during the last twenty four hours have been extremely unreal compared to anything else that I have experienced. Secondly, I cannot say how my thoughts on this subject will be at the end of this trial. If the trial were to be concluded today, as of today, I could give that verdict.

Q: You could give that verdict?

A: Yesterday I could have given it much easier than I could today just because of the people that I've heard and the remarks of the prospective jurors. Now this is... I am tending to go towards the negative in this. I can see it. My answer right now is as I just said.

Q: Are you saying that you have been influenced by the responses given by other prospective jurors?

A: I am.

Q: You are saying that? And it is also your testimony that you are not of the opinion that the death penalty as per se, is bad or unconstitutional or should not be applied?

A: I also said that.

Q: So that it is your testimony that in some instances the death penalty would be warranted. Is that correct?

A: That is correct.

Q: Would one of those instances be first degree murder in your mind where the death penalty would be warranted?

A: This would be...

Q: I'm not getting to the reasonable doubt aspect. What I'm saying is take ten different crimes, say kidnapping, first degree murder, rape and various things. You mentioned before that in certain instances you feel the death penalty shoudl be applied. Do you feel that it should be applied in the case, let's say, of aggravated rape of a child under twelve years old?

A: May I ask for the definition of first degree murder, first of all?

MR. BEZOU:

The court will have to give you instructions on what first degree murder is.

COURT:

Mr. Smith, Mr. Bezou...

(DISCUSSION OFF RECORD)

COURT:

Mr. Smith, I'm speaking to the juror now, if at the conclusion of this case when you've heard evidence from both sides and the court gives you legal instructions to be used by yourself to guide you in coming to a decision, and the court further instructs you that those instructions are the law of Louisiana as prescribed by the Louisiana Code of Criminal Procedure and the Louisiana Criminal Code, and law and the court further instructs you that if it be in your mind that the State has carried the burden

of proof as required under the law of Louisiana then you must come in with a sentence of guilty which necessarily requires the death penalty, can you then come to a decision after consulting with your fellow jurors and decide the guilt or innocence of the defendant, intelligently applying the facts and the evidence you've heard if the State has carried its burden of proof to a reasonable doubt in your mind?

MR. JAMES SMITH:

It is my opinion that the State's definition of reasonable doubt would not bring... would not definitely bring guilt to a degree that would be necessary for me to convict a man.

COURT:

Do you understand that it's not the State's definition of reasonable doubt? We can get highly technical, Mr. Smith, and debate this ad infinitum, but the reasonable doubt to be applied is that reasonable doubt which you yourself define as reasonable doubt. For me to attempt to develop semantics between certainty, reasonable doubt, absolute certainty would be improper at this time. And, obviously, you yourself included, all of us are concerned with the problem you're having or we wouldn't be taking up this time. But I can't go into further definition other than the one I've already given you.

MR. JAMES SMITH:

I would like to state that I realize fully what the

counsel and the Judge have said, and I would like to point out that I believe this could very well be a hinderance to justice in this case because of my part.

COURT:

Gentlemen, we have a new aspect now and...

MR. BEZOU:

798:2b

MR. SMITH:

I think Mr. Bezou is correct on this. I don't know if he has some pocket parts...

COURT:

Have you got the pocket parts?

MR. BRADLEY:

It's been amended.

COURT:

The amendment is not in for...

MR. BRADLEY:

That doesn't have that amendment. West messed it up.

MR. BEZOU:

What's the amendment to that? I have the '68 amendment.

(REMARKS OFF RECORD)

COURT:

Mr. Smith is excused from this jury.

(MR. SMITH LEAVES COURTROOM)

(JURY RETURNED TO COURTROOM)

COURT:

Recess is over. Let the record reflect at this time that

juror Mr. James Smith was excused for personal reasons.

Poll the jury.

MR. SMITH:

State waives the poll.

MR. BEZOU:

Defense also waives the polling of the jury.

MR. SMITH:

Do you want them to reseat...

COURT:

No, leave them... leave that seat vacant. The next one chosen on the jury will take that seat. Call six names, please. Wait one second. This will save us from emptying the courtroom again. Gentlemen, it is important that we try and choose a jury as soon as possible with the least amount of delay. It's no secret that eventually both the State and the defendant will run out of challenges, pre-emptory challenges. And that means that they can only challenge for cause after that. And we all know from our experience once they exhaust their challenges we'll choose a jury much faster. So I'm addressing you now on your preference because you people are more inconvenienced than us. I would like to go as late as possible tonight while I have the venire here. We're breaking for supper.

(DISCUSSION OFF RECORD)

You understand, we are not developing a pattern of working

MR. SMITH:

Now, gentlemen, I have told you that this is a capital case. That is the common terminology we use in Louisiana and, in effect, what it means is that when a verdict of guilty of first degree murder is returned it necessarily carries the penalty of death by electrocution. Now, I'm going to phrase a question and I'm going to ask each of you to answer to it. If chosen, do any of you have any religious, moral or conscientious scruples against the infliction of the death penalty to such a degree that you would refuse to render such a verdict knowing that it would carry the death penalty regardless of what the evidence showed from that witness chair?

Mr. Carte, do you have any such scruples against the infliction of the death penalty?

MR. CARTE:

No, sir.

MR. SMITH: [VENIREMAN JAMES G. VOLTA]

Mr. Volta?

MR. VOLTA:

I do.

Q: You say you do have conscientious, moral or religious scruples against the infliction of the death penalty?

A: Personally I don't believe in the death penalty.

Q: You just do not believe in it? Well, let me ask you

this question, Mr. Volta: Are your convictions against the death penalty so strong that you would refuse to even consider a verdict knowing that that verdict would necessarily carry the death penalty regardless of what the evidence showed?

A: Yes, I would.

[VENIREMAN ALVIN J. FOLSE]

MR. SMITH:

Mr. Folse, do you have any such scruples?

MR. FOLSE:

I don't believe in the death penalty either.

Q: I'll ask you if you have religious, moral or conscientious scruples against the infliction of the death penalty?

A: It's my feeling.

Q: Sir?

A: It's just my feelings, personal feelings.

Q: How long have you had those feelings?

A: I've always had them.

Q: Then I'll ask you the same question I asked Mr. Volta. Are your feelings against the death penalty so strong that you would not even consider rendering a verdict or voting for a verdict that necessarily would carry the death penalty regardless of what the evidence showed?

A: I don't think I could.

Q: You don't think you could even consider it, is that right?

A: Yes.

Q: In other words, what I'm trying to get at, if you will answer it plain, sir, is if you would not consider the death penalty at all regardless of what the evidence showed?

A: I don't think I could.

MR. BEZOU:

Your honor, if I may, can I ask him one question at this time along that line?

COURT:

On that line of questioning. Are you finished, Mr. Smith?

MR. SMITH:

No, sir, I'm not. On that line...

MR. BEZOU:

Just that line of questioning.

COURT:

It would probably save time if you let him ask the question.

MR. SMITH:

Yes, sir.

MR. BEZOU:

Mr. Folse, would you automatically vote against the imposition of capital punishment, that is, death, without regard to any evidence that might be developed during the trial in the case before you?

MR. FOLSE:

Would you repeat that? I didn't...

Q: All right. Would you automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial in this case before you?

A: Yes, sir.

MR. SMITH:

Your honor, I submit Mr. Volta and Mr. Folse, if he's through.

MR. BEZOU:

I'm through.

COURT:

Mr. Volta and Mr. Folse are excused. Nothing you heard in this courtroom may be discussed by you with any outside party until you know that the case has been concluded. Thank you, gentlemen.

(MR. VOLTA AND MR. FOLSE LEAVE COURTROOM)

MR. SMITH:

Mr. Carte, then I take it from your answers, sir, that in a proper case you could render a verdict of guilty knowing it would carry the death penalty?

MR. CARTE:

If the evidence proves it, yes.

Q: Do you know of any reason at all, Mr. Carte, why you could not give both the State of Louisiana and this accused a fair and impartial trial?

A: No, sir.

MR. SMITH:

Thank you, sir. I tender the venireman.

against the infliction of the death penalty?

MR. CHARLEY SMITH:

No.

MR. WALTER SMITH: [VENIREMAN A.J. SCHILLACTI]

Mr. Schillaci?

MR. SCHILLACI:

Well, I would have to know the complete circumstances.

Q: Well, that, sir...

A: I don't know how old this boy is or if he's a hardened criminal or... I've got mixed emotions about capital - about the death penalty. I'm not against it but I have reservations.

Q: Are you telling me that in a proper case you could consider bringing in a verdict knowing that it would carry the death penalty?

A: I would be influenced by the circumstances that prevailed, the individual, the circumstances.

Q: Would that be sympathy for the accused?

A: Not so much sympathy for the accused as a general belief in humanity and humanness. I don't want to go into the emotional aspects.

Q: Well, I would like for you to, really. This is something we need to know.

A: I would have to know a lot more than I know about this individual, what kind of person he is, what kind of background he has, what his education is, how old is he, what prompted the act if he did commit the act.

Q: Are you saying, sir, that...

MR. BEZOU:

Your honor, again, I know Mr. Smith is not going to like this but I'm going to voice an objection. I think he is going far beyond the purview of Article 798.

COURT:

Mr. Smith was going - it's the juror. The juror is raising these questions, not Mr. Smith.

MR. SMITH:

I haven't even asked the question, your honor. I was just fixing to ask it.

COURT:

In view of the reply to the juror... Counsel, approach the bench.

(REMARKS OFF RECORD AT BENCH)

COURT:

Gentlemen, because of certain statments made by the juror, Mr. Schillaci... Am I pronouncing that right, sir?

MR. SCHILLACI:

Schillaci.

COURT:

Schillaci - the court feels that it is necessary to instruct this juror as to the law of Louisiana relative to the constitutional right of the defendant to testify in a case in which he is charged. This point has been raised earlier. As a matter

of fact, two of the jurors on this panel have already heard this law cited to them. And the law is this, which I will instruct the entire panel at the time the case is submitted to them. Quote, "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant acting with the advice and assistance of his attorney. You must not draw any inference of guilt from the fact that he does not testify nor should this fact be discussed by you or enter into your deliberations in any way." So, Mr. Schillaci, the points that you have raised in your reply to Mr. Smith's questions may not never, may never come to your attention if they are not done through the testimony of another witness, namely, his age, educational background, and aspects of this subject matter. So that you, sir, are delving into questions which may never be answered in this case. I'm going to allow counsel now to, with that in mind and with that background, to once again pursue the Witherspoon statutes. I'm inclined to agree with Mr. Bezou that a more technical following of the statutes would probably be helpful.

MR. SMITH:

I'm going to do exactly that, your honor.

COURT:

OK.

MR. BEZOU:

Thank you, your honor.

MR. SMITH:

Mr. Schillaci, having heard the Judge's instructions I would ask you first... I'm going to ask you two questions and I would like for you to give me your honest answer on each of them, sir.

COURT:

Mr. Smith, your voice is trailing off and we're not getting it.

MR. SMITH:

I'm going to ask you two questions and I would like for you to give me your honest answers on both of them, sir. This feeling that you stated that you have against the death penalty, this general feeling that you have against the imposition of the death penalty, having heard the law read, I'm going to ask you: Would you automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial in the case before you? I'd like to go further with you. In other words, if you were convinced of the guilt...

MR. BEZOU:

Let's see if he will answer that one.

MR. SMITH:

Well, I'm trying to explain it, if I may, I'll let him answer that then.

COURT:

Good.

MR. SMITH:

Would you answer that, sir?

MR. SCHILLACI:

I really don't know. I'd like to have an alternative. I don't think I would have any problem finding a person guilty or not guilty.

Q: But where that verdict of guilty necessarily imposes the death penalty, would that give you a problem?

A: It would give me a problem, yes.

Q: Well, is your attitude toward the death penalty, sir, such that it would prevent you from making an impartial decision as to the defendant's guilt where you know that a verdict of guilty would carry the death penalty?

A: Frankly, I'm quite surprised to find this boy so young. I wouldn't have any problems with a hardened criminal type that had been prosecuted and in and out of jail or something of this type. But, really, I would almost have to know some background. It would be difficult for me to want to take the life of a person.

COURT:

Mr. Schillaci is excused with the court's thanks. Mr.

going to ask Mr. Jackson another question and then I'll ask both of you gentlemen a question. But I'm going to tell you this: As you sit there today both of you as free American citizens can disagree with the law. But once chosen as a juror, you will take an oath to apply the law as this court charges you the law. Do both ofyou understand that?

JURORS:

(Indicate yes) [VENIREMAN HAYWOOD J. JACKSON]

MR. SMITH:

This accused, James Washington, Jr. is charged with having committed first degree murder of James Alan Arterbury. First degree murder is what is known in our law as a capital crime. A verdict of guilty of first degree murder necessarily carries the death penalty. Death by electrocution. This court has no discretion in the matter. The law has set the penalty and that penalty is death by electrocution for a verdict of guilty of first degree murder. Now, with that in mind, Mr. Washington, I'm going to ask you several questions, the first of which is: Do you have any religious, moral or conscientious scruples against the infliction of the death penalty for a crime to such an extent that you could not render or would not even consider such a verdict regardless of what the evidence showed? Now, Mr. Washington, let me ask you that question. I'm sorry, Mr. Jackson, let me ask you

that question first - do you have any such scruples or feelings against the death penalty?

MR. JACKSON:

Mainly it depends on what you said about the crime that's been committed, you know, if it's murder, well, it seems like he's got to be punished. No, I don't have nothing against it.

Q: You don't have anything against the death penalty?

A: No.

Q: Well, let me ask you this, specifically this question, now. You say that you have been friends and have known Johnson Washington, Jr. as long as you can remember. And his family. Are you telling me, sir, that you could, in this case, assuming that you were convinced of the guilt of the accused beyond a reasonable doubt, could you consider, even consider rendering a verdict knowing that it would put Johnson Washington, Jr. to death by electrocution?

A: (Indicates no)

MR. SMITH:

Mr. Mohon, while we're on this subject...

COURT:

Mr. Jackson, you're excused, sir, with the court's understanding and thanks. I ask that you not discuss anything you heard in the courtroom with anyone until after this case is over. Thank you. (MR. JACKSON LEAVES COURTROOM).

the law in arriving at your verdict? Is that right?

A: Right.

Q: If after having done so, you have such a reasonable doubt as I spoke of a while ago, you have such a reasonable doubt as to the guilt of this accused, you could do as the law requires and turn him loose? Acquit him? Couldn't you?

A: Yes, sir.

Q: On the other hand, Mr. James, if at the conclusion of this case you have no such reasonable doubt as to the guilt of this accused you could do as the law directs and convict him? Could you do that, sir?

A: Yes, sir.

Q: Now, I've read you this indictment, Mr. James, and told you that the charge in this case is first degree murder. This is commonly called in our law a capital case, which means that a verdict of guilty of first degree murder necessarily carries the death penalty, death by electrocution. In other words, sir, this court has no discretion in the matter. The law sets the penalty. Which for a verdict of first degree murder, requires the penalty of death by electrocution. With that in mind I ask you this question: Do you have any religious, moreal, or conscientious scruples or strong feelings against the death penalty to

such a degree that you could not even consider rendering a verdict that would necessarily carry the death penalty regardless of what the evidence from that witness chair might show?

A: I am an emotional person and I don't think that I could render a decision if I thought that the verdict depends on the death penalty. I don't think that I could.

Q: Would that be regardless of what the evidence showed, sir? You're feelings are that strong?

A: Regardless of what the evidence showed.

Q: You would not even consider rendering a verdict knowing that verdict would necessarily carry the death penalty?

A: Not if it carried the death penalty.

MR. SMITH:

I submit him, your honor.

COURT:

Mr. James, you're excused with ourthanks. The court advises Mr. James that you cannot discuss what you heard in the court, the questions or your answers with anyone until such time as the case is over. Thank you, sir.

(MR. JAMES LEAVES COURTROOM)

CLERK OF COURT:

Henry R. Miller, Jr.

(OATH ADMINISTERED TO PROSPECTIVE JUROR)

Appendix D

Commonwealth v. O'Neal,
___Mass.__, __N.E.2d __,
Mass. Adv. Sh. (1975)

OFFICIAL OPINIONS
FROM THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS
AND
THE APPEALS COURT

3502

COMMONWEALTH vs. ROBERT E. O'NEAL.

Suffolk. June 9, 1975. - December 22, 1975.

Present: Tauro, C.J., Reardon, Quirico, Braucher, Hennessey, Kaplan, & Wilkins, JJ.

Homicide. Rape. Constitutional Law, Cruel and unusual punishment, Due process of law.

Indictments found and returned in the Superior Court on June 14, 1972. The cases were tried before Dimond, J.

William P. Homans, Jr., for the defendant.
D. Lloyd Macdonald, Assistant District Attorney, for the Commonwealth.
Raymond H. Young, Edward J. Barshak, Robert Haydock, Jr., Manuel Katz, Robert P. Moncreiff, & Terry P. Segal, for the Boston Bar Association, amicus curiae, submitted a brief.
Malvina Nathanson for the Massachusetts Defenders Committee, amicus curiae, submitted a brief.
Laurence H. Tribe & John Reinstein for the Civil Liberties Union of Massachusetts, amicus curiae, submitted a brief.
Lawrence D. Shubow, Clyde D. Bergstresser, Morris S. Shubow, & Jeremy A. Stahlin for the Massachusetts Council for the Abolition of the Death Penalty & another, amici curiae, submitted a brief.
Joseph P. Busch of California, District Attorney (Preston Trimble, Patrick F. Healy, Harry B. Sondheim, Arnold T. Guminski, & Daniel L. Bershin, of California, with him) for the National District Attorneys Association, as amicus curiae, submitted a brief.

BY THE COURT. Pursuant to our order in Commonwealth v. O'Neal, Mass. ., - (1975),[1] the parties and amici have presented arguments as to whether the State has a compelling interest in retention of the death penalty. We now address the issue whether the mandatory death penalty for murder committed in the course of rape or attempted rape, G. L. c. 265, § 2, is constitutional. For the reasons stated in the concurring opinions which follow, we hold that the mandatory death penalty for murder committed in the course of rape or attempted rape violates the Massachusetts Declaration of Rights and is unconstitutional. Accordingly, the judgment

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[1] Mass. Adv. Sh. (1975) 1086, 1100-1101.

FRIDAY DECEMBER 26,1975
VOL. 2 NO. 51
Officially Published Every Friday by Massachusetts Lawyers Weekly
30 Court Square Boston, Mass. 02108 Telephone 227-6034
Subscriptions are $45 per year
Second Class Postage Paid at Boston, Mass.

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on the murder indictment, in so far as it imposes the death sentence, is reversed, and the case is remanded to the Superior Court where the defendant is to be resentenced to imprisonment for life. See Commonwealth v. LeBlanc, 364 Mass. 1, 14-15 (1973);[b] Commonwealth v. Cassesso, Mass. (1975).[c] The other judgments appealed from are affirmed.

So ordered.

Chief Justice Tauro and Justices Hennessey, Wilkins and Kaplan concur in the order of the court. Justice Braucher concurs in the result only. Justices Reardon and Quirico dissent.

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[b] Mass. Adv. Sh. (1973) 1091, 1104-1105.

[c] Mass. Adv. Sh. (1975) 1971.

TAURO, C.J. (concurring). This case is before us again after further briefing and argument by the parties and amici on the question whether the mandatory death sentence for murder committed in the course of rape or attempted rape is constitutional. A majority of the court hold that it is not.

The facts are set out in our earlier opinion. Commonwealth v. O'Neal, Mass. , - (1975)[*] (O'Neal I). Briefly, the defendant was convicted of murder committed in the course of rape and was sentenced to death. In his appeal, he challenged both his conviction and his sentence. We affirmed the judgment of conviction in O'Neal I, and I limit my discussion here to the validity of the sentence imposed.

I. In determining whether the mandatory death penalty is constitutional in this context, I divide my analysis into two mutually supportive and interlocking parts: one relying on due process concepts derived from arts. 1, 10 and 12 of the Massachusetts Declaration of Rights, the other on the "cruel or unusual punishments" clause of art. 26 of the Massachusetts Declaration of Rights.[†] This dual analysis is possible here

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[*] Mass. Adv. Sh. (1975) 1086, 1087-1088.

[†] Although I base my decision here on the Constitution of the Commonwealth, I have relied to some extent on cases construing the United States Constitution. I believe that analysis of the issues raised in this case under our State Constitution bears strong resemblance to the analysis under the Federal Constitution. See Pugliese v. Commonwealth, 335 Mass. 471, 475 (1957). However, I need not reach the Federal constitutional questions in light of the result I reach under arts. 1, 10, 12 and 26.

where these two concepts are "so close as to merge" because the "due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause . . . —i.e., punishment may not be more severe than is necessary to serve the legitimate interests of the State." Furman v. Georgia, 408 U. S. 238, 359-360, fn. 141 (1972) (Marshall, J., concurring).

A. Due Process.

In order to be sustained against a due process challenge, a statute affecting fundamental rights must be shown to serve a compelling governmental interest. Commonwealth v. Henry's Drywall Co. Inc. Mass. , (1974).[b] Selectmen of Framingham v. Civil Serv. Comm. Mass. (1974).[c] Cf. Roe v. Wade, 410 U. S. 113, 155 (1973). "The key words [necessary to promote a compelling governmental interest] emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes." Dunn v. Blumstein, 405 U. S. 330, 342-343 (1972). See Opinion of the Justices, 363 Mass. 909, 916-917 (1973).[d] Additionally, it must be shown that the statutory scheme is the least onerous means of reaching the compelling goal. Roe v. Wade, supra. "Thus, if there is an alternative means by which the State can fulfil its purpose, having less adverse effects on fundamental constitutional rights, the State is required to use the less restrictive, more

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[b] Mass. Adv. Sh. (1974) 2377, 2380-2381.

[c] Mass. Adv. Sh. (1974) 2389, 2400.

[d] Mass. Adv. Sh. (1973) 1061, 1068.

precisely adapted means." Commonwealth v. O'Neal, Mass. , - (1975),[3] citing Fiorentino v. Probate Court, Mass. , (1974).[4]

There is little doubt that life is a fundamental right "explicitly or implicitly guaranteed by the Constitution." San Antonio Independent Sch. Dist. v. Rodriguez, 411 U. S. 1, 33-34 (1973). I stated in Commonwealth v. O'Neal, supra, at [5] that the "'. . . right to live . . . is the natural right of every man'" (quoting from Camus, Reflections on the Guillotine, in Resistance, Rebellion and Death, 131, 221 [1969]), encompassing as it does "the right to have rights." Trop v. Dulles, 356 U. S. 86, 102 (1958). See comment, The Death Penalty Cases, 56 Cal. L. Rev. 1268, 1354 (1968). Life is "the greatest of all goods," Beccaria, On Crimes and Punishments, 45 (Trans. ed. 1963), and I believe that capital punishment, which involves the extinction of life, the most fundamental of all rights, "triggers strict scrutiny under the compelling State interest and least restrictive means test."[6] Thus, in order for the State to allow the taking

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[3] Mass. Adv. Sh. (1975) 1086, 1097-1098.

[4] Mass. Adv. Sh. (1974) 403, 409.

[5] Mass. Adv. Sh (1975) at 1099.

[6] I do not share the concern of Mr. Chief Justice Burger that placing the burden on the State to justify the death penalty would open the floodgates to constitutional attacks on any punishment that might be imposed. Furman v. Georgia, 408 U. S. 238, 395-396 (1972). The selection of death as a punishment is a choice entirely different in kind from any other. A person less severely sentenced retains a substantial set of basic rights, see, e.g., Procunier v. Martinez, 416 U. S. 396 (1974); Barnett v. Rodgers, 410 F. 2d 995 (D. C. Cir. 1968); Runnels v. Rosendale, 499 F. 2d 733 (9th Cir. 1974); one who dies at the hands of the State retains nothing. Courts have consistently allowed a closer and more careful scrutiny

of life by legislative mandate it must demonstrate that such action is the least restrictive means toward furtherance of a compelling governmental end" (footnote added). Commonwealth v. O'Neal, supra, at

B. Cruel or Unusual Punishment.

The compelling State interest analysis noted above is equally relevant under art. 26. The words "cruel or unusual" are words of art, and, as such, they do not have the same significance they would have in everyday parlance. Their meaning in a constitutional sense must be determined by this

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where absolute deprivations are involved. See San Antonio Independent Sch. Dist. v. Rodriguez, 411 U. S. 1 (1973). Compare Boddie v. Connecticut, 401 U. S. 371 (1971), with Sosna v. Iowa, 419 U. S. 393, 410 (1975). Thus, the compelling State interest and least restrictive means analysis is particularly congruent with the absolute and irreversible deprivation resulting from a mandatory death penalty, whereas the less absolute features of routine punishments do not demand, and will not be given, such exacting scrutiny.

Mass. Adv. Sh. (1975) at 1100.

Notwithstanding the fact that, in O'Neal I, I deemed the vast literature concerning cruel and unusual punishment to be a morass which I preferred not to enter, other considerations persuade me that I should address the question of the constitutional validity of the death penalty for rape-murder under art. 26. If this case were to be decided solely on due process grounds, it would resolve no question as to the constitutionality of capital punishment under the cruel or unusual test. In the future, if this course is not followed, a defendant who has unsuccessfully challenged a capital punishment statute under the due process analysis proposed in O'Neal I could still seek to avail himself of the benefits of art. 26. I consider it advantageous to clarify the relationship between these two lines of analysis so as to provide guidance for prospective appeals, and, in view of the similarity of these analyses, I deem it most expedient to do so while this case is before us. It should also be noted that a majority of the court are of opinion that we should address this issue.

court."[4]

Of necessity, every punishment contains an element of cruelty. The convicted defendant who is deprived of freedom or property will feel that society's exactions bind him cruelly. However, society tolerates a degree of cruelty when such cruelty is necessary to serve its legitimate needs.[5] It is only where the level of cruelty is disproportionate to the magnitude of the crime, and as a consequence does not serve the needs of society, that a court will find the punishment to be too cruel and, thus, "cruel" within the meaning of

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[4] I examine the punishment in question here to determine its constitutionality "without regard to any subtleties of meaning that might be latent in the word 'unusual.'" Trop v. Dulles, 356 U. S. 86, 100, fn. 32 (1958). I do not believe that the word "unusual" has any qualitative meaning different from the word "cruel" in the context of this case. See The Death Penalty Cases, 56 Cal. L. Rev. 1268, 1345 (1968). This is particularly true under our State Constitution, where the words are used disjunctively. While we have never expressly decided whether the words were meant to be read in the disjunctive, see Storti v. Commonwealth, 178 Mass. 549, 553 (1901), and while we have used the conjunctive and disjunctive form of the phrase interchangeably on occasion, Commonwealth v. Moore, 359 Mass. 509, 515 (1971); Commonwealth v. Morrow, 363 Mass. 601, 610-611 (1973) (Mass. Adv. Sh. [1973] 775, 783), I believe that for purposes of this case "any nice argument upon the words of the article" is unnecessary. Storti v. Commonwealth, supra, at 553.

[5] It is noteworthy that one commentator has stated: "Cruelty is properly definable as 'the infliction of pain or loss without necessity'" (emphasis added). Gottlieb, Is the Death Penalty Unconstitutional? in Bedau, The Death Penalty in America, 194, 201-202 (Rev. ed. 1967), quoting from Webster's New Intl. Dictionary, 636 (Unabridged 2d ed. 1954). Accord, Gottlieb, Capital Punishment, 15 Crime and Delinquency 1, 11 (1969).

art. 26.[5] See McDonald v. Commonwealth, 173 Mass. 322, 328 (1899); Commonwealth v. Moore, 359 Mass. 509, 515 (1971); Commonwealth v. Morrow, 363 Mass. 601, 610-611 (1973).[6] See also Weems v. United States, 217 U. S. 349, 368, 381 (1910);[7] Robinson v. California, 370 U. S. 660, 666-667 (1962).

In ordinary circumstances, the Legislature is given broad discretion to determine what the appropriate punishment is for a given offense. Harding v. Commonwealth, 283 Mass. 369, 374-375 (1933). Commonwealth v. Morrow, supra. See Robinson v.

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[5] Certain punishments such as crucifixion, torture and burning at the stake were among the exactions which constitutional amendments regarding cruel and unusual punishment were meant to abolish. They are unconstitutionally cruel in and of themselves, apart from considerations in relation to the nature of the offense. See In re Kemmler, 136 U. S. 436, 446 (1890); Furman v. Georgia, 408 U. S. 238, 264-265 (1972) (Brennan, J., concurring). The death penalty itself has not been considered among these, as evidenced by specific mention of capital crimes in the Massachusetts Declaration of Rights, art. 12. See Furman, supra, at 283 (Brennan, J., concurring).

[6] Mass. Adv. Sh. (1973) 775, 783.

[7] Although it could be argued with some logic that, given the history of capital punishment and the barbarous means sometimes employed in England and elsewhere, the cruel and unusual clause concerned the manner of the execution and not the punishment of death per se, recent cases under the cruel and unusual punishment clause reflect a departure from that view. Former Supreme Court Justice Goldberg viewed the Weems case as the "turning point in the interpretation and application of the . . . clause" because it "clearly recognized that not only the mode of inflicting punishment but also the extent or severity of punishment is subject to scrutiny under the eighth amendment." Goldberg, The Death Penalty and The Supreme Court, 15 Ariz. L. Rev. 355, 359 (1973).

California, supra, at 665. Where restraints on liberty or fines are involved, a heavy burden is on the sentenced defendant to establish that the punishment is disproportionate to the offense for which he was convicted. If he fails to demonstrate such disproportion, the punishment will not be characterized as cruel in a constitutional sense.

Capital punishment, involving as it does the taking of life, is qualitatively different from other punishments. See Furman v. Georgia, 408 U. S. 238, 287 (1972) (Brennan, J., concurring). "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind." Furman v. Georgia, supra, at 306 (Stewart, J., concurring). "[I]n assessing the cruelty of capital punishment . . . we are not concerned only with the 'mere extinguishment of life' . . . (In re Kemmler (1890) 136 U. S. 436, 447) . . . but with the total impact of capital punishment, from the pronouncement of the judgment of death through the execution itself, both on the individual and on the society which sanctions its use."[1] People v. Anderson, 6 Cal. 3d 628, 646 (1972), cert. den. sub nom. California v. Anderson, 406 U. S. 958 (1972).

While the actual physical and psychological pain of execution itself is, of course, immeasurable, there is a sharp conflict of expert opinion regarding whether electrocution produces instantaneous loss of consciousness. At least one observer, a French scientist, concluded: "I do not believe that anyone killed by electrocution dies instantly, no matter how weak the

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[1] Capital punishment is "[a]n anachronism too discordant to be suffered, mocking with grim reproach to all our clamorous professions of the sanctity of life." Benjamin Cardozo, quoted in Dictionary of Quotable Definitions 65 (Brussel ed. 1970).

subject may be." Comment, The Death Penalty Cases, 56 Cal. L. Rev. 1268, 1339 (1968), quoting Prof. L. G. V. Rota in Scott, The History of Capital Punishment, 219 (1950). "Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death." Furman v. Georgia, supra, at 287 (Brennan, J., concurring).

The convicted felon suffers extreme anguish in anticipation of the extinction of his existence.[3] "The tremendous mental strain of inexorably approaching a foreordained death is unique to the condemned man." Note, Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L. Rev. 814, 830 (1972). Studies describe confinement under sentence of death as exquisite psychological torture, wherein many inmates suffer obvious deterioration and severe personality distortions, including denial of reality. See Gottlieb, Is the Death Penalty Unconstitutional? in Bedau, The Death Penalty in America, 194, 201 (Rev. ed. 1967); Chessman, Trial by Ordeal, 185-194 (1955). See also Bluestone and McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Am. J. of Psychiatry 393 (1962); Solesbee v. Balkcom, 339 U. S. 9, 14 (1950) (Frankfurter, J., dissenting).

In order to uphold the constitutionality of punishment which inflicts such suffering and absolutely extinguishes all rights, the State must advance a substantial justification to

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[3] In the instant case, the defendant has been incarcerated under sentence of death since February 28, 1973.

2. I turn now to examine the interests advanced by the Commonwealth in order to determine whether the mandatory death penalty for rape-murder is constitutional.

I recognize at the outset that the Commonwealth has a vital interest in protecting society from rape-murderers and in deterring rape-murder. My inquiry must look beyond these vital interests, however, to determine whether the means chosen, use of the death penalty as punishment for convicted rape-murderers, is compelled as the least restrictive means available to further these ends. In order to achieve the proper balance, I must determine whether these interests can be effectively served by means which do not impair fundamental constitutional rights, here the right to life, to the extent that the death penalty does.

It is not difficult to identify the discrete interests thought to be served by our penal policy. The Commonwealth identifies three areas of vital interest: (1) saving lives, (2) protecting citizens from crimes of violence, and (3) ensuring justice and diminishing recourse to vigilantism. Translated into the more familiar jargon of penology and corrections, these interests are, respectively, (1) deterrence, (2) isolation/incapacitation, and (3) retribution/moral reinforcement.[11] See

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[11] There is, of course, one additional objective of punishment which has not been urged by the Commonwealth to justify use of capital punishment. "The reformation of the individual offender is usually regarded as an important function of punishment. But it can have no application where the death penalty is exacted." Report of the Royal Comm. on Capital Punishment, 1949-1953, 18 (HMSO 1953). Killing convicted criminals is utterly inconsistent

demonstrate that the penalty of death is not disproportionate or unnecessary and is not, thus, cruel in a constitutional sense. See People v. Anderson, 6 Cal. 3d 628 (1972), cert. den. sub nom. California v. Anderson, 406 U. S. 958 (1972). See also Rudolph v. Alabama, 375 U. S. 889, 891 (1963) (Goldberg, J., dissenting); Furman v. Georgia, supra, at 331-332 (Marshall, J., concurring). I believe that the required showing is that of a compelling State interest.[19]

Thus, pursuant to either chain of analysis, it is incumbent upon us to determine whether imposition of the mandatory death penalty for rape-murder serves a compelling State interest and whether its use is the least restrictive means toward furtherance of a permissible goal.

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[19] This analysis is not foreclosed by previous decisions of this court interpreting art. 26. While Storti v. Commonwealth, 178 Mass. 549 (1901), assumed that the death penalty was constitutional, "[p]ast assumptions . . . are not sufficient to limit the scope of our examination of this punishment today." Furman v. Georgia, supra, at 285 (Brennan, J., concurring). Furthermore, we are not constrained by that decision because art. 26, like the Eighth Amendment to the United States Constitution, must be interpreted progressively, Weems v. United States, 217 U. S. 349, 378 (1910), and in light of "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U. S. 86, 101 (1958).

Packer, The Limits of the Criminal Sanction, 35-58 (1968). I examine these interests seriatim, keeping in mind that a proper balance requires that the inquiry be "not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than [life] imprisonment." Furman v. Georgia, 408 U. S. 238, 303 (1972) (Brennan, J., concurring).

A. Deterrence.

"[T]he question to be considered is not simply whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment." Furman v. Georgia, supra, at 346-347 (Marshall, J., concurring). See Bedau, Deterrence and the Death Penalty: A Reconsideration, 61 J. of Crim. L., Criminology and Police Science,539, 542 (1971); Morris and Zimring, Deterrence and Corrections, 381 The Annals 137 (1969). Despite the most exhaustive research by noted experts in the field, there is simply no convincing evidence that the death penalty is a deterrent superior to lesser punishments. In fact, the most convincing studies point in the opposite direction.

By Res. of 1967, c. 150, the Massachusetts Legislature established a special commission to investigate and study the effectiveness of capital punishment as a deterrent to crime.

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with rehabilitation, and the death penalty obviously negates and utterly frustrates any interest the Commonwealth has in that ultimate goal.

The commission was composed of legislators, educators, attorneys and others prominent in the criminal justice field. In its interim report issued in October, 1968, the commission stated: "It is the opinion of the majority . . . that the death penalty is not a deterrent to crime. No evidence presented to this Commission substantiated the proposition that capital punishment is a more effective deterrent to murder than imprisonment." Report, p. 5. The commission went on to say that "[t]he evidence clearly establishes that at the very least the death penalty is no more of a deterrent than life imprisonment." Id. at 12.

These findings are consistent with those of the special commission to investigate and study the abolition of the death penalty in capital cases established in 1957 (Res. of 1957, c. 141). That commission concluded that "[c]apital punishment is not a better protection against murder than a sentence of life imprisonment." 1959 House Doc. No. 2575, p. 44.

The conclusions of these legislative commissions are in accord with the results reached by virtually all contemporary criminologists who have studied deterrence and the death penalty in the United States. Examples of their conclusions are as follows: "The preponderance of the evidence indicates that capital punishment does not act as a deterrent to murder." Chambliss, Types of Deviance and the Effectiveness of Legal

Sanctions, 1967 Wis. L. Rev. 703, 704. "It now seems established and accepted that the existence or non-existence of capital punishment . . . makes no difference to the homicide rate or to the attempted-homicide rate." Morris and Zimring, Deterrence and Corrections, 381 The Annals 137, 143 (1969). "[S]tatistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value." Schuessler, The Deterrent Influence of the Death Penalty, 284 The Annals 54, 62 (1952). "The conclusion is inevitable that the presence of the death penalty -- in law or practice -- does not influence homicide death rates." Sellin, Capital Punishment, 138 (1967).

These conclusions are based on numerous studies utilizing various techniques. Several studies have compared the homicide rates in States that have abolished capital punishment with carefully matched similar and/or contiguous States that have retained it.[13] These studies uniformly conclude that homicide rates "are conditioned by other factors than the death penalty." Sellin, The Death Penalty, Appendix to Am. Law Inst., Model Penal Code (Tent. Draft No. 9, 1959) at 24. See Schuessler,

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[13] Homicide rates are a fairly accurate predictor of capital murder rates as the proportion of capital homicide to the crude homicide rate remains fairly constant from year to year and from jurisdiction to jurisdiction. Sellin, The Death Penalty, Appendix to Am. Law Inst., Model Penal Code (Tent. Draft No. 9, 1959) 23-34.

The Deterrent Influence of the Death Penalty, supra, at 57-58. Thomas, This Life We Take, 14-15 (4th rev. 1970).

Additionally, studies have been conducted where the homicide rates of States that have abolished capital punishment have been compared before and after abolition. These studies also indicate that there is no increase in the homicide rate after abolition. Reckless, The Use of the Death Penalty, 15 Crime and Delinquency 43, 54 (1969). Sellin, The Death Penalty, supra, at 34-38. The same result is obtained by comparing the experience in other countries before and after abolition. See Bowers, Executions in America, 123-126 (1974). Similarly, the increase in homicide rates experienced after the "judicial moratorium" on executions in 1967 by States which had retained capital punishment was no greater than in those States that had abolished it, and, in fact, the overall increase in homicide rates from 1969-1970 was lower than that from 1964-1967. Id. at 139-147.

Finally, comparisons of the homicide rates in selected jurisdictions for periods immediately prior to and after publicized executions or sentences of death indicate no significant differences, suggesting that the execution or sentence did not effectively deter others. Reckless, The Use of the Death Penalty, supra, at 54-55. Savitz, A Study in Capital Punishment, 49 J. of Crim. L., Criminology and Police Science, 338 (1959). While these two particular studies are of limited

validity and reliability because of restricted sampling, they present some indication that neither the availability nor the actual use of the death penalty acts as an effective deterrent.[13]

The studies previously cited make no distinctions between mandatory and discretionary use of capital punishment. In fact, however, most were conducted in situations involving the discretionary use of the death penalty, and thus their relevance to the mandatory death penalty at issue here could be questioned. However, a recent study conducted by Professor William J. Bowers, a noted sociologist, concludes that there is "no indication that the mandatory death penalty . . . [is] a more effective deterrent of homicide than discretionary capital punishment." Bowers, Executions in America, supra, at 160.

Professor Bowers examined the homicide rates in States that changed from mandatory to discretionary capital punishment.

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[13] There is some question as to whether executions carried out in private, with limited publicity and no public access, can ever be an effective deterrent. Perhaps deterrence could be more effectively achieved by making executions public, but no one has seriously advocated this position for many decades. See Camus, Reflections on the Guillotine, in Resistance, Rebellion and Death 173, 180-182 (1969). Today we reject public executions as debasing and brutalizing to us all. Furman v. Georgia, 408 U. S. 238, 297 (1972) (Brennan, J., concurring).

Additionally, he compared these rates with contiguous States that were consistent in maintaining either fully mandatory or discretionary capital sentencing. He found no statistically significant changes in homicide rates as a result of these changes in practice. Among those States studied were Massachusetts and Connecticut, both of which changed from mandatory to discretionary use of the death penalty in 1951. Professor Bowers found that "Massachusetts experienced remarkable stability of homicide rates after the change, and Connecticut actually had a decline in homicide rate . . .. Clearly, the statutory changes in Connecticut and Massachusetts did not result in increasing homicide rates, nor even an increase relative to their contiguous states." Id. at 149-150. Based on considerable data, both before and after World War II, Bowers concluded: "[W]e must unequivocally reject the claim that mandatory death sentencing has any deterrent advantage over the discretionary use of capital punishment." Id. at 157.[14]

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[14] The fact that a mandatory death penalty has not been shown to act as a greater deterrent to homicide is not surprising when consideration is given to the fact that mandatory death sentences lead to low conviction rates. In a study conducted in Massachusetts during a period of mandatory capital punishment for murder in the first degree, statistics reveal that only 8% of those indicted for murder were convicted of murder in the first degree and less than 7% were actually executed. Ehrmann, The Death Penalty and the Administration of Justice, 284 The Annals 73, 74-79 (1952). See Bowers, Executions in America, supra, at 161-162. This refusal by juries to convict in capital cases where there is a mandatory death sentence has been documented on many occasions. See, e.g., McGautha v. California, 402 U. S. 183, 199 (1971); Shipley,

There is correspondingly no statistical support for the proposition that law enforcement officials are safer in jurisdictions that retain capital punishment as opposed to those in which it has been abolished. Claims that more police are killed in abolition States are simply not supported by available data. "On the whole, the abolition states . . . seem to have fewer killings, but the differences are small." Sellin, The Death Penalty and Police Safety, in Sellin, Capital Punishment, 138, 152 (1967). "[T]he data available . . . after a survey of half the state police forces of the United States do not lend empirical support to the claim that the existence of the death penalty in the statutes of a state provides a greater protection to the police then exists in states where that penalty has been abolished." Campion, Does the Death Penalty Protect State Police? in Bedau, The Death Penalty in America, 301, 314-315 (Rev. ed. 1967).

Does Capital Punishment Prevent Convictions? 43 Am. L. Rev. 321 (1909); Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. of Pa. L. Rev. 1099 (1953). See also Kalven and Zeisel, The American Jury, 310-312 (1966). The relationship between mandatory capital punishment and deterrence is best exemplified by the following quote: "Antebellum Americans, . . . whose experience with mandatory capital punishment was extensive, tended to account it a dangerous failure. They were satisfied that mandatory capital punishment did indeed have a deterrent effect: it deterred jurors from convicting palpably guilty men." Mackey, The Inutility of Mandatory Capital Punishment: An Historical Note, 54 B. U. L. Rev. 32, 35 (1974) (footnote omitted).

While the overwhelming majority of serious studies in this area have concluded that capital punishment has no special deterrent effect, one recent study and several subjective reports have indicated a contrary result.

The single scientific study which gives any indication that the death penalty may have a deterrent effect is Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, Am. Economic Rev. 397 (June, 1975). Ehrlich utilizes regression analysis to demonstrate that capital punishment has deterred several homicides in the past. However, serious flaws have been revealed both in Ehrlich's approach and in his results.[15] We are not persuaded that this study adds much, if anything, to our analysis.

The other studies cited by the Commonwealth for the proposition that the threat of capital punishment acts as a deterrent are collections of the subjective statements of apprehended felons and police to the effect that many perpetrators of crime carried phony or unloaded weapons because they were afraid of the death penalty. Los Angeles Police

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[15] The Ehrlich study has been severely attacked on many grounds. While much of the criticism is extremely technical, see, e.g., Passell and Taylor, The Deterrent Effect of Capital Punishment: Another View (Col. U. Discussion Paper No. 74-7509, March, 1975), it essentially attacks the methodology, the use of arbitrary assumptions regarding the mathematical form of relationships among variables, the sensitivity of the model to minor statistical variation and the failure to take into consideration the interdependence of relevant variables.

Department Study (1971), cited in 52 Congressional Digest 21 (1973). (See Bedau, The Death Penalty in America, 267 [Rev. ed. 1967], for an earlier version of this study.) These reports are particularly unreliable because the statements were made under apparently coercive circumstances where the subjects might be expected to have said whatever they believed the police wanted to hear. This expectation is corroborated by former San Quentin Warden Clinton Duffy who acknowledged the statements allegedly made to police, but added, "[W]hen . . . everything is resolved legally, . . . I believe that they give you a little bit more of the regular story than they do when they are in jail trying to curry a little bit of favor." To Abolish The Death Penalty, Hearings on Senate Bill 1760 before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U. S. Senate, March 20, 21, and July 2, 1968, 23 (G. P. O. 1970). Warden Duffy interviewed many inmates confined at San Quentin and stated: "I have, to date, not had one person say that they had ever thought of the death penalty prior to the commission of their act." Ibid. Thus, I conclude that these two sources of support for the proposition that the death penalty acts as a deterrent to homicide in fact actually provide little support at all.

My review of the available studies and other material cited reveals no firm indication that capital punishment acts as a superior deterrent to homicide than other available punish-

ments.[15] At best the evidence is equivocal. I am thus unable to find that the Commonwealth has a compelling interest in deterrence which cannot adequately be served by other less restrictive means of punishment.

B. Isolation/Incapacitation.

While isolating convicted murderers from society in order to prevent their commission of similar crimes in the future is a legitimate objective of punishment, it seems clear that this goal can be effectively served by means less restrictive than death. "The sufficient answer [to the claim that the infliction of death is necessary to stop those convicted of murder from committing further crimes] . . . is that if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and

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[15] It is noteworthy in this regard that the report of the Massachusetts Special Commission stated, "It is the swiftness and certainty of punishment and not its severity that deters." 1959 House Doc. No. 2575, p. 44. Cases where a mandatory death sentence is the ultimate sanction take longer to litigate and tend to involve more protracted appellate procedures. See Furman v. Georgia, 408 U. S. 238, 357-358 (1972) (Marshall, J., concurring). In this way, the availability of capital punishment tends to decrease, rather than increase, the deterrent effect of criminal sanctions.

techniques of isolation can eliminate or minimize the danger while he remains confined." Furman v. Georgia, 408 U. S. 238, 300-301 (1972) (Brennan, J., concurring).

Additionally, it should be stressed that "murderers in general have been shown to be among the least recidivistic of offenders." Packer, The Limits of the Criminal Sanction, 52 (1968). This is true with regard both to incidents while on parole, Giardini and Farrow, The Paroling of Capital Offenders, 284 The Annals 85 (1952); Stanton, Murderers on Parole, 15 Crime and Delinquency 149 (1969); Bedau, Parole of Capital Offenders, Recidivism, and Life Imprisonment, in Bedau, The Death Penalty in America, 395 (Rev. ed. 1967); Miller, Some Notes on Death Row and the Death Penalty in Massachusetts (1971), and to incidents of violence while in prison. Sellin, The Death Penalty, Appendix to Am. Law Inst., Model Penal Code (Tent. Draft No. 9, 1959) 70-71. "Once released from prison . . . [convicted murderers] have a very low rate of reconviction for any criminal offenses, let alone for murder." Packer, supra, at 52-53.

It is true that in the Eighteenth and early Nineteenth Centuries, before creation of an effective prison system, the death penalty was considered necessary for the protection of society. See Bedau, The Courts, the Constitution, and Capital Punishment, 1968 Utah L. Rev. 201, 232. However, "[n]ationally, there is substantial information now available to show that murderers can be incarcerated and paroled

with safety, and that there is no discernible difference in this regard between those who are found guilty of one rather than another kind of criminal homicide." Bedau, Death Sentences in New Jersey, 1907-1960, 19 Rutgers L. Rev. 1, 47 (1964). While this may be somewhat less true of convicted rape-murderers, who are more likely to act as a result of uncontrolled or uncontrollable desires,[17] measures are available to ensure the safe care and custody of such persons where a real danger to society is indicated. See, for example, the statute providing for care and treatment of "sexually dangerous persons," G. L. c. 123A.

Accordingly, I am not convinced that the death penalty is necessary as the best means of protecting society from the convicted rape-murderer, and I believe that the Commonwealth's interest in isolation/incapacitation, while vital, can be

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[17] The recidivism rate for convicted rapists released on parole is almost three times greater than that for convicted murderers. Compare Callahan, Statistical Tables Describing the Characteristics and Recidivism Rates of Men Released During 1966 from M.C.I. Norfolk, M.C.I. Walpole, M.C.I. Concord, and the Massachusetts Forestry Camps (1971), with Miller, Some Notes on Death Row and the Death Penalty in Massachusetts (1971). To the extent that the statistics for rape may be more relevant in determining the appropriate recidivism rate for rape-murderers, it is possible that this class of murderers is more likely to become involved in subsequent criminal activity if released than murderers in general.

adequately served by less onerous means.[18]

C. Retribution/Moral Reinforcement.

The Commonwealth contends that it has a compelling interest in ensuring justice and maintaining the social compact, and that utilization of proportional punishment is necessary to achieve that goal. It further contends that under this scheme the death penalty is the appropriate punishment for rape-murder. However, while I agree that the interests advanced are valid and that moral reinforcement or reprobation requires that the most serious crimes be punished most seriously, I believe that "[g]rading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty." Bedau, The Death Penalty in America, 268 (Rev. ed. 1967). This is true in part because

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[18] Utilization of imprisonment to "incapacitate" the convicted rape-murderer serves the additional desirable function of keeping him available in the event error should subsequently be discovered and the adjudication of his guilt reversed. Such instances are not unknown in our criminal law. See Borchard, Convicting the Innocent (1970); Frank, Not Guilty (1957). See also Sellin, The Death Penalty, Appendix to Am. Law Inst., Model Penal Code (Tent. Draft No. 9, 1959) 63-65. The words of Thomas Jefferson are particularly appropriate here: "I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me." Quoted by Senator Hart, Hearings on Senate Bill 1760, Committee on the Judiciary, U. S. Senate 14 (G. P. O. 1970).

no assessment of the degree of punishment necessary to effect retribution is possible.[19] The demand for punishment does not define the nature of the punishment necessary for retributive purposes, and it cannot be shown that any particular penalty is more supportable in light of these purposes than any other.[20] Furthermore, I believe that "it is incompatible with the dignity of an enlightened society to attempt to justify the taking of life [merely] for purposes of vengeance." People v. Anderson, 6 Cal. 3d 628, 651 (1972), cert. den. sub nom. California v. Anderson,

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[19] The notion that the public wants capital punishment is based more on abstract emotion than hard reality. When faced squarely with the choice and responsibility of putting someone to death, jurors overwhelmingly avoid the death sentence. Statistics obtained from Suffolk County indicate that, since 1963, juries recommended that the death penalty not be imposed in at least thirty-nine cases involving some fifty-five defendants. As one's proximity to the actual sentence of death and responsibility therefor increases, the belief that capital punishment is appropriate appears to diminish in fervor. The rhetorical question has often been put: "How many advocating the death sentence would be willing to pull the switch?"

[20] If death is the most appropriate punishment for murder in a retributive sense, then burning to death would seem to be the most appropriate punishment for arson resulting in death or stabbing to death when the murder is committed by stabbing. However, few people today would contend that such a punishment is desirable, or, in fact, constitutionally permissible. The problems in allowing retribution in the "lex talionis" sense to govern the choice of criminal sanction are obvious.

406 U. S. 958 (1972). While retribution may be a permissible aspect of punishment, it "is no longer the dominant objective of the criminal law," Williams v. New York, 337 U. S. 241, 248 (1949), and it cannot act as the sole justification for a particular penalty. See 1959 House Doc. No. 2575, p. 43.

The Commonwealth also suggests that capital punishment is necessary to prevent recourse to vigilantism. However, "[t]here is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders." Furman v. Georgia, 408 U. S. 238, 303 (1972) (Brennan, J., concurring). To the contrary, "[r]eliable statistics now pretty definitely show that the states that have had the most homicides and the most legal executions have also had the most illegal executions, in the form of lynchings." Bedau, The Death Penalty in America, supra, at 335. See Caldwell, Why is the Death Penalty Retained? 284 The Annals 45, 46-47 (1952). See also 1959 House Doc. No. 2575, p. 24.[21]

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[21] This positive correlation between legal executions and illegal executions may well be a by-product of the "brutalizing effect" of capital punishment. See Bowers, Executions in America, 194 (1974). "The existence of capital punishment tends to cheapen human life. It tends to encourage both children and adults to believe that physical violence, the ultimate form of which is putting an individual to death, is a proper method of resolving social and personal conflict." 1959 House Doc. No. 2575, p. 45.

There is simply no basis for the claim that the death penalty is necessary "to prevent an outraged community from taking the law into its own hands." Sellin, The Death Penalty, Appendix to Am. Law Inst., Model Penal Code (Tent. Draft No. 9, 1959) 79.

I am compelled to the conclusion that the Commonwealth has not sustained its burden of establishing that the death penalty is a necessary and least restrictive means for accomplishment of whatever valid interests it may have in ensuring justice and maintaining the social compact. Whatever marginal benefit use of capital punishment might have in serving the interests of retribution or moral reinforcement is not sufficient to withstand the strict constitutional scrutiny required here.

On the basis of the foregoing analysis, I conclude, as I must, that the Commonwealth has not offered an adequate justification for retention of the mandatory death penalty for rape-murder.[23] The Commonwealth has not met its heavy

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[23] A similar conclusion was reached by Sir Ernest Gowers who, as chairman of the British Royal Commission to study capital punishment, spent almost five years of intensive research and study on the issue. He stated: "Before serving on the Royal Commission I, like most other people, had given no great thought to this problem. If I had been asked for my opinion, I should probably have said that I was in favour of the death penalty, and disposed to regard abolitionists as people whose hearts were bigger than their heads. Four years of close study of the subject gradually dispelled that feeling. In the end I became convinced that the abolitionists were right in their conclusions -- though I could not agree with all their arguments -- and that so far from the sentimental approach

burden of demonstrating that, in pursuing its legitimate objectives, it has chosen means which do not unnecessarily impinge on the fundamental constitutional right to life. Accordingly, I believe that the mandatory death penalty for murder committed in the course of rape or attempted rape violates both the "due process" clauses of the Massachusetts Constitution, arts. 1, 10 and 12, and the cruel or unusual punishments clause of art. 26,[23] and I concur in the judgment of the court.

3. This opinion, and the concurring and dissenting opinions of Justices Braucher and Reardon which follow, reflect three different and distinct views as to the role of this court in the adjudication of constitutional issues. Each has a different

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leading into their camp and the rational one into that of the supporters, it was the other way about." Sir Ernest Gowers, A Life for a Life? foreword (London, 1956).

[23] In arriving at this conclusion I would not intend to foreclose the Commonwealth from enacting any statute authorizing the death penalty. However, if such a statute should be enacted, the burden would be on the Commonwealth to establish that such use of the death penalty is the least restrictive means for furtherance of a compelling State interest. My opinion is restricted solely to the pertinent statute which mandates the death penalty in rape-murder cases.

perspective on the proper exercise of our constitutional responsibilities when dealing with pronouncements of the legislative branch of the government. In view of the important and complex issues before us and the manner in which the concurring and dissenting opinions were articulated, I find it necessary to comment briefly on them.

A. Justice Braucher concurs in the result of today's decision, but reaches that result based on his interpretation of the statute, c. 265, § 2. I believe Justice Braucher seeks to avoid reaching the constitutional issues at the cost of distorting the clear language and history of the statute.

I believe it is inappropriate, if not improper, for this court to resort to doubtful statutory construction in order to evade important constitutional questions properly before us. See School Comm. of Springfield v. Board of Educ. Mass. , - (1974).[1] "Judicial self-restraint in reaching constitutional attacks on legislative amendments and judicial rules of statutory construction are both predicated on our desire to respect the Legislature's special prerogative in enacting legislation. I feel that the purposes underlying both these doctrines will be ill served by a ruling which avoids reaching a constitutional question by giving a strained and

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[1] Mass. Adv. Sh. (1974) 2031, 2064-2082.

unreasonable construction of the statute which negates its clear intent." First Natl. Bank v. Attorney Gen. 362 Mass. 570, 579 - 581 (1972) (Tauro, C.J.)[23]

The use of strained statutory interpretations invades the legislative province and disturbs the proper balance between legislative and judicial function. It transforms what the Legislature said into something the Legislature never intended.[24] In doing so, such strained interpretations do more to violate the spirit of art. 30 of the Massachusetts Declaration of Rights than does facing a constitutional issue which is properly presented. "The canon of avoidance of constitutional doubts must, like the 'plain meaning' rule, give way where its application would produce a futile result, or an unreasonable result plainly at 'variance with the policy of the legislation as a whole.'" Shapiro v. United States, 335 U. S. 1, 31 (1948), and cases cited. Accord, United States

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[23] Mass. Adv. Sh. (1972) 1711, 1720-1721.

[24] "When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right. Let him beware, however, or he will usurp the office of government, even though in a small way he must do so in order to execute its real commands at all." Hand, "How Far Is a Judge Free in Rendering a Decision?" in The Spirit of Liberty, 79, 83 (I. Dilliard ed. 1959).

v. Sullivan, 332 U. S. 689, 693 (1948); Scales v. United States, 367 U. S. 203, 211 (1961); Welsh v. United States, 398 U. S. 333, 345, 354-356 (1970) (Harlan, J., concurring). See, generally, note, Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions, 53 Col. L. Rev. 633 (1953).

With this in mind, I turn to Justice Braucher's concurring opinion. Relying on Commonwealth v. Harrington, Mass. (1975),[1] he believes that his construction of the statute avoids the constitutional issues and would be "not only fairly possible but plainly right." He assails my opinion in O'Neal II as an attempt to create a constitutional issue and resolve it by ignoring "the clear statutory direction that rape murder cases be treated like other cases in which no jury recommendation is made" (p. [2] (emphasis added). With all due respect, it is my view that no such "clear statutory direction" is available from either the words or the history of c. 265, § 2. I think Justice Braucher is plainly wrong.

The language of c. 265, § 2, as amended by St. 1951, c. 203, is clear. It provides that no recommendation of clemency "shall be made . . . if the murder was committed in connection with the commission of rape or an attempt to commit rape." This provision was added as an amendment to a statute which would have made the death penalty discretionary in all cases. See 1951 House Doc. No. 2148. At the time this provision was

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[1] Mass. Adv. Sh. (1975) 447.

[2] Mass. Adv. Sh. (1975) p.3557.

approved, three other provisions, which would have retained mandatory capital sentencing in three other circumstances,[25] were defeated. Mandatory capital sentencing appeared in no other murder offense. See 1951 Senate Journal, pp. 608-612. Thus, the Legislature manifested a clear intention that rape-murder be treated differently from all other types of murder.

The history of the 1951 amendment since its enactment indicates that in a great majority of non-rape-murder cases juries have recommended that the death penalty not be imposed.[26] Jury clemency is precisely what the Legislature intended to avoid in rape-murder cases; accordingly, it was put beyond the power of the jury in such cases to eliminate the death penalty. There is something seriously amiss in the logic and reasoning of Justice Braucher's conclusion that there is a "clear statutory direction that rape murder cases be treated like other cases in which no jury recommendation is made." The significant and important difference is that in rape-murder cases, the Legislature

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[25] The four amendments proposed in the Senate would have prevented jury recommendations of clemency where (1) the murder was committed by a person previously convicted of murder, (2) the victim was a police officer, (3) the murder was committed in an escape attempt or by one under a life sentence or previous sentence of death, or (4) the murder was committed in the course of rape or attempted rape.

[26] See Cannon, First Degree Murder: The Post Conviction Experience in Massachusetts, 4 (1974).

mandates the death penalty; in other murder cases, the question is left to the jury. Justice Braucher ignores this obvious distinction, which is supported by both the language and the history of the amendment, merely to avoid reaching a most difficult but important constitutional issue. In doing so, the entire analysis of his concurring opinion is rendered suspect. I cannot agree with his interpretation of the statute, nor can I subscribe to such an avoidance of our constitutional duty.

B. I strongly disagree with Justice Reardon's novel suggestion that we refrain from construction and application of our State Constitution while we await decision of the Federal constitutional issues in North Carolina v. Fowler, 285 N. C. 90 (1974), cert. granted 419 U. S. 963 (1974). The point is utterly without merit. This court — not the Federal courts — bears ultimate responsibility for construction of our State Constitution. Our interpretation of the State Constitution is final and cannot be challenged in the Federal courts. A Federal court decision cannot dispose of State constitutional issues confronting us. See Minnesota v. National Tea Co. 309 U. S. 551, 552-555, 558-559 (1940) (opinion of the court and of Hughes, C.J., dissenting).

Justice Reardon's allusion to preserving a vague "symmetry of the law" cannot warrant delay. See Commissioner of Corps. & Taxn. v. Bullard, 313 Mass. 72, 93-94 (1943). It serves only to cloud the issue. Justice Reardon's objective of "symmetry" is, in

reality, a suggestion of uniformity of State and Federal constitutional direction with a resulting subservience to Federal precedent. Such "symmetry" would sweep aside the Declaration of Rights and deprive the Commonwealth's citizens of the Declaration's protection against arbitrary and intrusive government.

The fact that anlysis under our State Constitution may parallel analysis under the Federal Constitution or that the analysis under the State Constitution may call for comparative construction of similar Federal provisions is no basis for evading our responsibility to declare the constitutional law which may be dispositive of the case. Although the United States Supreme Court must ultimately determine the scope and meaning of the Federal Constitution and establish uniformity of construction, State courts such as ours have the power and the obligation, when necessary, to state our own construction of the Federal Constitution in its application to a given case. That power, which has sanction in the Federal Constitution,[27] is essential if the State courts are to comply with their overriding obligation to decide cases as they are presented without contravening the supreme Federal law. Martin v. Hunter's Lessee,

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[27] "In the scheme of the Constitution, [the State courts] are the primary guarantors of constitutional rights." Bator and others, Hart and Wechsler's, The Federal Courts and the Federal System, 359 (2d ed. 1973).

1 Wheat. 304, 340-342 (1816). Cases constantly raise constitutional issues of first impression which have not been addressed by previous decisions of the United States Supreme Court. State courts cannot withhold decision in the perhaps vain hope that a future [28] Supreme Court judgment will decide the precise point at issue and "take them off the hook." They must fill the interstices among the Supreme Court's constitutional holdings with their own constructions and accept the risk that a future Supreme Court will find those constructions discordant with its own. [29]

In urging that we defer consideration of this case, Justice Reardon would follow the safe course — he would avoid the risk of a discordant Supreme Court result. In the

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[28] A judge cannot predict when a case will be decided. The history of the Fowler case should amply document this proposition. The case, argued once before on April 21, 1975, has been scheduled for reargument by the Supreme Court (U. S. [1975] [(June 23, 1975) 43 U. S. L. Week 3674]), but the date has not yet been set and there is no indication of when the argument will take place.

[29] A further consideration is relevant here. At times we have indicated that our rulings in cases were reached reluctantly under the compulsion of decisions of the United States Supreme Court. We did so recently in Commonwealth v. A Juvenile, Mass. , (1975) (Mass. Adv. Sh. [1975] 2766, 2771). Other jurisdictions have followed the same path. It makes more sense, when we have the opportunity, to expound our views before Supreme Court decisions are rendered on the issue than to criticise that court's decisions after the fact when we have remained mute. Only the former approach gives any hope of providing the Supreme Court with fresh innovative thinking. On occasion the Supreme Court has explicitly adopted not only the holding of a State court but also the court's reasoning in reaching its decision. See Reitman v. Mulkey, 387 U. S. 369 (1967).

process, he would deny the defendant his undoubted right to a speedy determination (and effectuation) of essential constitutional rights and would implicitly deny our responsibility to decide cases before us. I believe the exercise of our duties and the interest in speedy, orderly disposition of cases must take precedence over the avoidance of such risk.

C. Justice Reardon's concern with the due process argument has been dealt with elsewhere and requires only a brief comment here.

Justice Reardon indicates the depth of his problem in applying due process concepts to capital punishment with the following statement: "If 'life' is a fundamental interest under the Constitution, why is not 'liberty' also a fundamental interest?" In another context he asks the same rhetorical question as to the right of privacy. However, Justice Reardon has answered his own questions logically and rationally, with his statement: "It may be argued of course that nothing is so fundamental as the right to life, that it is an interest on another plane altogether." But not being content with his own answer he then reverts to his old problem by saying, in effect, that in the application of due process he cannot distinguish between taking a life and sending a man to jail or invading his privacy! Thus, he concludes, there is no fundamental right to life guaranteed by the Constitution.

D. Justice Reardon also warns against allowing personal philosophical views on capital punishment to impel a decision which may be at odds with the popular will. I assume that Justice Reardon has very much in mind the California experience after People v. Anderson, 6 Cal. 3d 628 (1972), cert. den. 406 U. S. 958 (1972). A constitutional amendment, in effect, negated a ruling of the California Supreme Court that capital punishment is unconstitutional.

I agree that personal philosophies should form no part of constitutional decision-making. We sit as appellate judges in cases raising constitutional issues not to enshrine our personal views in the Constitution, but to construe that document with its occasionally complex and uncertain language and apply it to the facts before us. Construction is necessary because a Constitution, by its nature, cannot contain explicit solutions for all problems. As Mr. Chief Justice Marshall wrote: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind." M'Culloch v. Maryland, 4 Wheat. 316, 407 (1819). But the detail supplied by case-by-case construction and application must not have its foundation in the judge's personal views. These views must be subordinated to the principles

underlying the document to be construed.[30] "[T]he ultimate touchstone of constitutionality is the Constitution itself . . .." Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 491 (1939) (Frankfurter, J., concurring). Construction takes the outline of principle established by the words of the document and fills it with substance. The judge exercises his judgment to determine, in the light of prior cases, the reasoning expressed therein, his experience and his training, what substance is required by the principle.

However, judges cannot look to public opinion polls or election results for constitutional meaning as has been suggested. It is our duty to interpret the Constitution to the best of our personal abilities and judgment. Our Constitution requires that we be "as free, impartial and independent as the lot of humanity will admit." Massachusetts Declaration of Rights, art. 29. If we succumb to contemporary public opinion we lose that requisite independence and

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[30] "For judges, it is not merely a desirable capacity 'to emancipate their purposes' from their private desires; it is their duty. . . . Does . . . [a man] change his character by putting on a gown? No, he does not change his character. He brings his whole experience, his training, his outlook, his social, intellectual, and moral environment with him when he takes a seat on the supreme bench. But a judge worth his salt is in the grip of his function. The intellectual habits of self-discipline which govern his mind are as much a part of him as the influence of the interest he may have represented at the bar, often more so." Frankfurter, Of Law and Men: Papers and Addresses of Felix Frankfurter, 1939-1956, 40-41 (Elman ed. 1965).

impartiality demanded of us and fail totally in our purpose. The words of Attorney General Rufus Choate in his address before the Constitutional Convention of 1853 are particularly apposite here: "If a law is passed by a unanimous legislature, clamored for by the general voice of the public, and a cause is before . . . [a judge] on it, in which the whole community is on one side and an individual nameless or odious on the other, and he believes it to be against the Constitution, he must so declare it, -- or there is no judge." 2 Brown, The Works of Rufus Choate with a Memoir of his Life 287 (1862).

Oppressed, disfavored or unpopular minorities would be the victims of any loss of judicial independence. The minorities rely on the independence of the courts to secure their constitutional rights against incursions of the majority, operating through the political branches of government. Dependent or subservient courts render nugatory the fundamental constitutional protections which are the heart of our liberties.[31] "The complete independence of the Courts of justice is peculiarly essential in a limited Constitution. . . . Limitations of this kind can be preserved in practice no other way than through the medium of the Courts of justice; whose duty it must be to declare all Acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or

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[31] Had the Justices of the United States Supreme Court considered public reaction at the time, how likely would they have been to hand down their landmark decision in Brown v. Board of Educ. of Topeka, 347 U. S. 483 (1954)?

privileges would amount to nothing." The Federalist Papers No. 78 (1788).

Passing public passions and emotions (understandable as they may be at times such as these) have little to do with the meaning of the Constitution, as it is written. Referendums, although they serve some purpose, do not pretend to construe the Constitution. They express only ephemeral sentiments, sentiments which are highly variable over time and which may reflect public attitudes shaped by collateral problems and events of the day. Public sentiment becomes relevant to constitutional adjudication only if it results in a constitutional amendment. This is a result which occurs only when the public sentiment is sufficiently high and sustained so that it is not dissipated with the passing of time and further reflection. When the Constitution is thus amended, the popular will has been properly exercised; the fundamental document's principles have been altered in accordance with the procedures set forth in the compact. Only through an amendment can mass passions affect constitutional meaning and, absent an amendment, the Constitution stands as an unbreachable bulwark for the individual against those mass passions and the political power of the majority.

Thus, the fact that the people of California amended their Constitution after the highest court of that State declared the death penalty unconstitutional does not indicate to me that we should not reach and decide a properly presented constitutional

issue in accordance with our considered views of the statute and Constitution. It merely indicates the possibility that an amendment to our Constitution may be the popular response to our decision. If this eventuates, so be it. The amendment, and not a judicial anticipation of such a response, is the proper constitutional procedure.

In conclusion, I add a few words: It is strange for Justice Reardon to imply that some members of this court or other courts who seek in good faith to exercise their judgment on difficult constitutional issues do so by improperly substituting personal views for the constitutional document. One wonders then what the basis of his opinion is and how he would respond to identical ad hominem charges. One might well infer that he draws his views from the public views he emphasizes. But is this the proper exercise of judicial independence mandated by the Constitution?[22]

The answer to this rhetorical question has been amply stated above. It can be summarized, briefly and simply. The great responsibility of a judge is to exercise his best judgment in applying his interpretation of the law to the facts. No judge should ever be concerned with whether his decision will be popular or unpopular. He does his job always with complete awareness that political considerations of the day, contemporary public emotions (no matter what their motivation),

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[22] *I wish POPULARITY: but, it is that popularity which

and personal philosophies are completely foreign and irrelevant to the exercise of his judicial power. This is the very essence of judicial duty — no less should be given and no more should be required.

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follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow," quoted by Lord Mansfield in Rex v. Wilkes, 4 Burrows Reports 2527, 2562 (1770).

HENNESSEY, J. (concurring). I concur with the opinion of the Chief Justice, in result and reasoning, and in his conclusion that the mandatory death penalty for rape-murder violates both the due process guaranty of arts. 1, 10 and 12 of the Massachusetts Constitution and the cruel punishments proscription of art. 26.[1]

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[1] I add that I also believe that all of the Justices of this court should have given further consideration, as an additional ground for our decision herein, to whether the United States Supreme Court has stated reasoning in Furman v. Georgia, 408 U. S. 238 (1972), which requires a conclusion that the death penalty as established in G. L. c. 265, §§ 1, 2, is proscribed, even as to rape-murder, by the Constitution of the United States. A majority of the Justices of the Supreme Court established by their opinions in the Furman case the unconstitutionality of sentencing practices which vest juries or judges with untrammeled discretion to determine whether the penalty should be death or life imprisonment. It can be argued that the law of this Commonwealth is that murder in the second degree must be submitted to the jury as a permissible verdict in every murder case, including rape-murder, regardless of circumstances. Commonwealth v. French, 357 Mass. 356, 405 (A-40) (1970). Commonwealth v. Chase, 350 Mass. 738, 744 (1966), cert. den. 385 U. S. 905 (1966). Commonwealth v. Desmarteau, 16 Gray 1, 8-11 (1860). Commonwealth v. Gardner, 11 Gray 438, 443, 445-446 (1858). See Commonwealth v. Corcione, Mass. , - (1974) (Mass. Adv. Sh. (1974) 151, 155-156); Commonwealth v. Rollins, 354 Mass. 630, 634 (1968). See also Green v. Commonwealth, 12 Allen 155, 166, 170-171 (1866). But see (as to rape-murder) Commonwealth v. McGarty, 323 Mass. 435, 441 (1948). From this it can be further argued that, since second degree murder is not punishable by the death penalty, the jury have unconstitutional untrammeled discretion in a rape-murder to choose between life imprisonment and the death penalty. It appears that dissenting Justices Reardon and Quirico would hold that the Furman principle is not applicable here; Justice Braucher, as well, apparently took that position in O'Neal I. Chief Justice Tauro, in O'Neal I, also stated that the principle is not applicable Justice Wilkins, joined by Justice Kaplan, infra, expressly states that he does not reach Federal constitutional grounds.

I of course disagree with the two dissenting Justices who urge that our decision in this case should await the decision of the United States Supreme Court in similar pending cases. We have a duty to face these issues, at least with reference to the Constitution of the Commonwealth, without regard to cases pending in the Supreme Court. In this case, and others which have been argued before us and not yet decided, we have been urged by persons under sentence of death to decide the issue. They are entitled to our prompt consideration. There may be further long delay before the Supreme Court disposes of relevant cases, and it may not then decide the issues.

A further reason why this court should proceed decisively at this time, without regard to the pace of the United States Supreme Court, is that Massachusetts is unique in the context of the death penalty controversy. Between 1947 and 1972 (the Furman case was decided in 1972) no person was executed in this Commonwealth. During that same period I take notice that the death sentences of twenty-five persons were commuted or reduced by executive action.[2] During this time span seven different Governors served. There is the best of reasons to believe that the Constitution of the Commonwealth, a viable document, does not now permit capital punishment in rape-murder cases. There may be some kind of murders which may be shown to meet the test of compelling State

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[2] Of the twenty-one other individuals sentenced to death between 1947 and the Furman decision, eighteen have had their sentences reduced because of the Furman decision, two received new trials and were found not guilty, and one committed suicide awaiting execution. See Cannon, First Degree Murder: The Post Conviction Experience in Massachusetts, 15 (1974).

interest which we have said is constitutionally required: perhaps crimes which in their characteristics are a peculiar and serious threat to public order and safety (e.g., murders related to terrorism and kidnappinglare of that order. Beyond that, if the present will of the people of the Commonwealth is that capital punishment should be permitted in some or all cases of murder in the first degree, procedures for amendment of the State Constitution which are relatively speedy, but still require time for reasonable reflection, are available to accomplish that end.

WILKINS, J. (concurring in the result). I agree that the defendant should be resentenced to imprisonment for life. I reach this conclusion on the sole ground that execution of the defendant for this crime would violate art. 26 of the Declaration of Rights of the Constitution of the Commonwealth.

The Commonwealth has not established that the imposition of the death penalty for this crime serves any purpose which cannot be achieved as well by a sentence of imprisonment for life. Therefore, the sentence of death constitutes "cruel or unusual punishment" in violation of art. 26 of the Declaration of Rights. Because of this conclusion, I need not address arguments resting on any other portion of the State Constitution or any arguments based on provisions in the Constitution of the United States.

In writing on this matter earlier, I said that "I believe that art. 26 requires, at the very least, that the Commonwealth not take a person's life unless that action serves a substantial purpose which cannot otherwise be achieved." Commonwealth v. O'Neal, Mass. , (Wilkins, J., concurring).[2] I then joined in an order

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[2] Mass. Adv. Sh. (1975) 1086, 1102-1103.

[3] We in Massachusetts should be particularly conscious of the seriousness of the imposition, or at least the threat of the imposition, of the penalty of death. In the past 300 years, we have attracted inordinate attention, not all of it favorable, because of the existence of capital punishment. The

of the court which in effect allowed further briefs to be filed on "the question of the extent of the Commonwealth's interest in the imposition of the death penalty in rape-murder cases." Id. at .

Without reaching the question whether the death penalty may be imposed constitutionally in any circumstance, I conclude that the Commonwealth has not established that a sentence of death for a rape-murder, as opposed to life imprisonment, serves a substantial public purpose. If the brutality of taking a human life can be sustained at all in this Commonwealth, where no one has been executed since 1947, I believe that the Commonwealth must show a need for that death.

From the discussion in the Chief Justice's opinion it seems clear that if the death penalty, as opposed to life imprisonment, could be sustained in these circumstances deterrence would be the principal ground of support.[2] There are

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irreversible finality of the execution of a criminal defendant can be both the source of universal regret, as events subsequent to the Salem witch trials plainly show, and the reason for intensified feelings concerning fairness in the administration of justice, as certain consequences of two murders in South Braintree in 1920 also plainly show. In addition, the existence of the penalty of death may be a deterrent not to crime but to conviction of murder in the first degree. See Judge Robert Sullivan's studied views of the reason for the 1893 acquittal of Lizzie Andrew Borden in Goodbye Lizzie Borden, p. 194 (1974). See also the foreword by Mr. Joseph N. Welch to The Untried Case by Mr. Herbert B. Ehrmann (2d ed. 1960) in which Mr. Welch discusses the cases of the Salem witches, Lizzie Borden and Nicola Sacco and Bartolomeo Vanzetti in relation to the death penalty.

[2] Mass. Adv. Sh. (1975) at 1102.

[3] Retribution does have an important place in justification of the amount of punishment for the commission of a crime but cannot carry the burden alone of sustaining the imposition of a sentence of death, as opposed to life imprisonment, in these circumstances.

crimes as to which the deterrent effect of the threat of death may serve a purpose which cannot be achieved by the threat of life imprisonment. One example is murder in the course of the commission of a serious crime, such as kidnapping or holding a hostage, during which the criminal has ample time to reflect on the consequences of his taking of a life. Another example may be murder by a convicted murderer who is already subject to life imprisonment where the threat of the imposition of the death penalty may be the only available deterrent. There are no doubt other examples. The Commonwealth has not shown that murder in the course of rape or attempted rape is such a crime. One cannot infer with confidence from the nature of the crimes that the threat of the death penalty, as against life imprisonment, deters the commission of murder in the course of rape or attempted rape, and at this time there are no legislative findings or a report of a commission on which the Commonwealth may rely in support of the death penalty.[3]

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[3] Indeed, for years, the threat of capital punishment may not have had any significant deterrent effect in this Commonwealth. Since the last execution for murder in this Commonwealth in 1947 and prior to the decision in Furman v. Georgia, 408 U. S. 238 (1972), numerous persons were convicted of murder in the first degree and sentenced to death, as was required in the absence of a contrary jury recommendation. However, none of these murderers has been executed. If we assume that a person is sufficiently reflective to note that his conduct may result in the commission of murder in the first degree, we may reasonably assume as well that that person will conclude that one way or another he will not suffer capital punishment because no one has been executed in Massachusetts since 1947.

The application of constitutional principles is not immutable, and criminal penalties thought appropriate in 1780 are no longer accepted in our society. See Weems v. United States, 217 U. S. 349, 378 (1910); Trop v. Dulles, 356 U. S. 86, 100-101 (1958). In my view, our State Constitution tells us today that the State may not engage in the senseless killing of a murderer, even though he is by definition a person who has committed a senseless killing himself. Execution of such a criminal would be both "cruel" and "unusual" within the meaning of those words in art. 26 of the Declaration of Rights.

KAPLAN, J. (concurring in the result). I agree with Justice Wilkins that the result in the present case should be pitched on art. 26 of the Declaration of Rights, and I join in the substance of his opinion. I add a note, however, about a preposition which in Justice Wilkins's opinion is put more as a question than an assertion, but which emerges perhaps more definitely as an implication from the opinion of the Chief Justice. The proposition is this: If there are crimes (or perhaps homicidal crimes?) to which the prospect of punishment of death could be shown to serve as a stronger deterrent than life imprisonment (how much stronger?), then those crimes may be constitutionally amenable to that punishment. The "if" clause is a highly speculative one. But supposing that the condition is satisfied, I note that the constitutional question would hardly be concluded. Among other matters, a court would then have to consider whether any legislative rule authorizing capital punishment, even a nominally "mandatory" rule, can be administered without caprice edged with discrimination against racial minorities and the poor, and whether, judged by evolved standards, the penalty itself is not so brutal and brutalizing as to be

proscript. I mean to emphasize that "deterrence" is only one of the several factors that bear on the constitutional issue.

BRAUCHER, J. (concurring in the result). On the constitutional issues discussed in the opinions of my brothers, I find myself in agreement with the dissenting opinion of Justice Reardon. The latter opinion recognizes, however, that a substantial Federal and State constitutional question is presented. I therefore think we should first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. See First Natl. Bank v. Attorney Gen. 362 Mass. 570, 594-597 (1972)[a] (concurring opinion of Quirico, J.); School Comm. of Springfield v. Board of Educ. , (1974)[b] (concurring opinion of Quirico, J.). In my opinion such a construction is not only fairly possible but plainly right. I therefore concur in the result reached by the court, though not in the reasons given for that result.

We recently reviewed the history of capital punishment in Massachusetts. See Commonwealth v. Harrington, Mass. (1975).[c] Before 1951 the death sentence was

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[a] Mass. Adv. Sh. (1972) 1711, 1734-1736.
[b] Mass. Adv. Sh. (1974) 2031, 2063.
[c] Mass. Adv. Sh. (1975) 447, 453-462.

the only punishment for first degree murder. In 1951 our statute took substantially its present form, permitting the jury, as part of a verdict of guilty of murder in the first degree, to recommend that the sentence of death be not imposed. G. L. c. 265, § 2, as appearing in St. 1951, c. 203. The punishment was then to be imprisonment for life without parole. "No such recommendation shall be made by a jury or recorded by the court if the murder was committed in connection with the commission of rape or an attempt to commit rape." Thus the punishment for first degree rape murder was to be the same as the punishment in any other first degree murder case in which no such recommendation was made. Until the decision in Furman v. Georgia, 408 U. S. 238 (1972), that punishment was death.

The Furman decision eliminated the death penalty in cases where no jury recommendation was made, if the jury were permitted to recommend that the sentence of death be not imposed. Stewart v. Massachusetts, 408 U. S. 845 (1972). Literally, the statute does not provide for any other penalty in such cases, but we held, "as matter of statutory construction," that "the only remaining relevant permissible penalty is imprisonment for life." Commonwealth v. Cassesso, Mass. , (1975)[d]. See Commonwealth v. Gilday, Mass. ,

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[d] Mass. Adv. Sh. (1975) 1971, 1973.

(1975),[e] and cases cited.

The possibility remained that we might hold, as to first degree murder committed after the Furman decision, that the provision for a jury recommendation was severable and invalid, and that the death sentence was mandatory. The trial judge in the Harrington case took that view, but we held that the only proper punishment was imprisonment for life. Commonwealth v. Harrington, supra, at [f] We recognized that the trial judge's view "had support in decisions in other States and was not clearly foreclosed by decisions of this court or the Supreme Court of the United States." Id. at [g] But we had "no way of knowing how the Legislature would have reacted in 1951 if it had foreseen the situation which arose more than twenty years later." Id. at [h] We therefore adopted the "construction which operates in favor of life or liberty." Id. at [i] quoting Commonwealth v. Martin,

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[e] Mass. Adv. Sh. (1975) 1135, 1152.

[f] Mass. Adv. Sh. (1975) at 459-462.

[g] Mass. Adv. Sh. (1975) at 463.

[h] Mass. Adv. Sh. (1975) at 460.

[i] Mass. Adv. Sh. (1975) at 461.

17 Mass. 359, 362 (1821).

Now we have before us a question expressly left open in the Harrington case. By implication a bare majority of the Justices take the view that the provision for a jury recommendation is severable, and that what remains is a mandatory provision for the death penalty applicable only in cases of first degree rape murder. In all other cases where no jury recommendation is made, the statutory provision for the punishment of death, "as matter of statutory construction," means imprisonment for life, but in rape murder cases it means death. An isolated fragment of what was once an intelligible policy is thus preserved. This result is contrary to the clear statutory direction that rape murder cases be treated like other cases in which no jury recommendation is made. The majority Justices attribute to the Legislature an intention which is then held unconstitutional. Worse, the majority opinions cast serious doubts on the constitutionality of any death penalty which may be enacted hereafter. In order to prevent review by the Supreme Court of the United States, the case is made to turn on the Massachusetts Constitution rather than on the substantially similar provisions of the United States Constitution. Reliance is placed on a California decision which was promptly annulled by the people of California. Compare People v. Anderson, 6 Cal. 3d 628 (1972), cert. den. sub nom. California v. Anderson, 406 U. S. 958 (1972), with California Constitution, art. 1, § 27, adopted November 7, 1972.

So far as I can discover, no Legislature anywhere has ever established a system in which rape murder is punished by a mandatory death sentence and no other crime is subject to any death sentence. Certainly our Legislature did not

vote for such a system in 1951. Recent proposals, vetoed by the Governor, to enact a mandatory death penalty have not embodied such a system. 1973 Senate Doc. No. 1976. 1974 House Doc. No. 5360, vetoed, 1974 House Doc. No. 5540. 1975 House Doc. No. 603, vetoed, 1975 House Doc. No. 5909. The logic of our decisions since the Furman case is opposed to our establishment of such a system. Indeed, the system is now established only as a straw man, so that it can be destroyed. I would prefer to adopt the "construction which operates in favor of life or liberty."

The legislative history of the 1951 amendment confirms my view. The sponsors of the bill sought to eliminate capital punishment as a practical matter by the provision for a jury recommendation. They felt that abolition as matter of law was too drastic a change, and that a bill proposing total abolition would have a poor chance of passage. See Note, The Death Penalty in Massachusetts, 8 Suffolk U. L. Rev. 632, 635 (1974). After the bill passed the House, the provision precluding a jury recommendation in rape murder cases was added in the Senate by a vote of 20 to 19. The sponsor of the added provision was one of 15 who voted for it and then voted against the bill when it passed by a vote of 20 to 16. 1951 Senate Journal 608-612,

647-648. If the Legislature had foreseen the situation that has now arisen, it is extremely unlikely that it would have enacted the result this court now reaches. It is far more likely that it would have left in force the pre-1951 mandatory death penalty for all first degree murder, contrary to our decision in the Harrington case.

In sum, we should give great weight to a legislative judgment on what sentence is appropriate, but we are not bound to defer to a judgment the Legislature never made. When an intelligible legislative policy is tortured beyond recognition by constitutional developments, it may be the part of wisdom to await explicit new legislation, taking account of the new situation, rather than to preserve a remnant of the former policy. Cf. Commonwealth v. Horton, Mass. , (1974)[1] Commonwealth v. A Juvenile, Mass. , (1975).[2]

One final thought. To sentence a man today to be executed, if at all, at an indefinite time several years from now may well be to inflict a cruel and unusual punishment. No one desires that result, but in the present situa-

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[1] Mass. Adv. Sh. (1974) 599, 607.

[2] Mass. Adv. Sh. (1975) 2766, 2794.

tion it seems as a practical matter to be the almost inevitable result of a death sentence. For the reasons I have already stated, I cannot bring myself to attribute to the Legislature of 1951 an intention which would produce that result in the case now before us.

REARDON, J., dissenting (with whom Quirico, J., joins). I dissent. When on April 18, 1975, the four separate opinions in Commonwealth v. O'Neal, Mass. (1975)[a] (O'Neal I), were released I pointed out that constitutional issues relative to the imposition of the death penalty had been fully argued and should be met by this court. Those issues were not addressed. Instead the first of the opinions, that of the Chief Justice inviting further briefs on a "narrow issue," a result in which three Associate Justices concurred, did not meet the constitutional issues which had already been fully argued, save that four Justices agreed that there should be no revision of the verdict on the basis that discretion was lodged with the jury to determine whether the death penalty should be imposed. O'Neal I, at - , (1975).[b] In reference to the Eighth Amendment argument by counsel on the death penalty as "cruel and unusual punishment," the first of those opinions stated that "in deciding the case on this basis [viz., whether the death penalty is violative of the Eighth Amendment], we would simply enter the morass in which many others have floundered before us," and that "[i]n view of the rationale of this opinion, further debate and controversy on the applicability of the constitutional prohibition of cruel and unusual punishment will serve no useful purpose at this time. We elect instead to

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[a] Mass. Adv. Sh. (1975) 1086.

[b] Mass. Adv. Sh. (1975) at 1090-1093, 1106.

adopt an approach free from the abundant commentary and exhaustive material surrounding the Eighth Amendment route." Id. at - [c]. Having thus avoided the real question before the court, an order was issued that the parties reappear before us and argue to the point whether the imposition of the death penalty for rape-murder subserves a compelling State interest and "satisfies the least restrictive means test." A majority of the court, having themselves thus posed a new issue which the parties had neither raised nor argued in their briefs, then allowed the parties the limited period of thirty days within which to file briefs thereon. The case was advanced for reargument on that basis and the present opinion, O'Neal II, is the result.

1. The Significance of North Carolina v. Fowler.

In the interim North Carolina v. Fowler, 285 N. C. 90 (1974), cert. granted 419 U. S. 963 (1974), raising identical Federal constitutional questions, has been argued before the Supreme Court of the United States and is set for reargument in the present term. U. S. (1975).[d] It is my belief that this court would do well, in view of the changed circumstances, to await that decision before launching on

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[c] Mass. Adv. Sh. (1975) at 1095-1096.

[d] (June 23, 1975) 43 U. S. L. Week 3674.

another excursion in this case. My view is strengthened in the light of the curious development that, while somewhat clouded, the first opinion at this juncture picks up the very questions which were refused consideration before and, in endeavoring to deal with them, engages in a large discussion indeed of the extensive literature on capital punishment. This is so notwithstanding that in O'Neal I there is recognition that the constitutional issues, State and Federal constitutional provisions, dictate identical results (fn. 5), a thought which is repeated in O'Neal II (fn. 1 to the opinion of the Chief Justice). A majority of the court are of opinion that in spite of the foregoing we should come down now with this opinion presumably since we are at liberty to assess the weighty questions before us under art. 26 of the Massachusetts Constitution. Passing for the moment the fact that the core of the Chief Justice's O'Neal II opinion rests on Federal precedent, I am led to believe that it does not contribute to the symmetry of the law to have this court go off on one tangent while the Supreme Court of the United States presently may go off on quite another. In short, with the question of Federal constitutionality presently pending before the United States Supreme Court in the Fowler case, we should defer to that court on that

phase of the question, as ultimately we must. If that court, considering only the question of Federal constitutionality, rejects capital punishment, that will be decisive of the O'Neal case. But if it upholds capital punishment the decision will not preclude Massachusetts or any other State from considering the question under its own Constitution. This is not "subservience to Federal precedent." Rather it is the exercise of simple common sense.

Nothing which I have said above is intended to be an expression of my personal views on the highly controversial subject of capital punishment, or on the present statutes of this Commonwealth on that subject. Indeed, a judge's personal philosophies on this subject cannot prevail over constitutional mandates or prohibitions, nor should they be permitted to affect constitutional judgments. I am quite familiar with the literature now adverted to in the main opinion. It is a sample of much more. But in evaluating the "evidence" contained therein we must be careful not to exceed the authority or abuse the power entrusted to us as a court. "That there may be an earnest conflict of serious opinion does not suffice to bring matters of legislative judgment within the range of judicial cognizance." Commonwealth v. Leis, 355 Mass. 189, 201 (1969) (Kirk, J., concurring). We should not permit a strong desire to cure the evils of the world to lead us into areas properly reserved,

under our constitutional system of government, for other branches. In other words, our task here is to appraise the constitutional propriety of our statutes unhampered by any attempt to inject personal views which may warp the constitutional frame. Whether we judges, as individuals, like it or not, and how many times do we review legislation that we would dearly like to revise if we could, we are bound to remain within our proper confines and hew to an application of the several Constitutions which gives them a fair reading uninhibited by any sense of strain. That is at once our duty and our function.

2. Due Process of Law.

The foregoing is prefatory to the discussion which follows on aspects of due process and whether the death penalty constitutes "cruel and unusual punishment" in a constitutional sense. The guidelines set up in the Chief Justice's opinion in O'Neal I were in essence designed to discover whether the imposition of the death penalty for rape-murder could be sustained against a challenge under the due process clause of the Fourteenth Amendment to the United States Constitution. Three Justices concurred. However, at least two of them joined in the call for further briefs only because the question of the Commonwealth's interest in imposing capital punishment in rape-murder cases was deemed to be important under the cruel and unusual punishment clauses of the State and Federal Constitutions. As

previously stated, I felt then and feel now that this question had been fully argued and that no further inquiry was necessary. I might add that having perused the second set of briefs and heard argument on the narrow issue on which O'Neal I invited arguments, I cannot say that anything of consequence has surfaced which was not presented to us originally. The O'Neal I net caught very small fish indeed.

In O'Neal I, I specifically reserved the right to state my views on the constitutional issues, and I address myself first to the thesis there presented by the Chief Justice, that the death penalty should be reviewed under the due process clause and that the statute imposing the penalty must fall unless the Commonwealth convinces this court that it serves a compelling State interest and satisfies the least restrictive means test. O'Neal I, at p. ✓ I am convinced that this framework of analysis is both unwise and constitutionally unsound.

First, let us clarify the role played by the due process clause of the Fourteenth Amendment in a constitutional attack on the Commonwealth's right to impose the death penalty in this case. The Eighth Amendment is the appropriate avenue for consideration of this question but standing by itself is not applicable to the States. Rather it is because the due process clause has been held to incorporate the proscription against cruel and unusual punishments contained in the Eighth Amendment that we refer to the latter amendment as binding on the States. Robinson v. California, 370 U. S. 660, 667 (1962).

✓ Mass. Adv. Sh. (1975) at p. 1100.

Furman v. Georgia, 408 U. S. 238, 241 (1972) (Douglas, ... concurring). Cf. Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, 463 (1947). It becomes evident that the due process clause contains at least one substantive limitation on the severity of punishments which the State may impose and that is that they not be cruel and unusual. The question which the opinion of the Chief Justice in O'Neal I raises is whether there is a second independent substantive limitation on punishments stemming from the due process clause. If so, it would follow that imposition of the death penalty might be held not violative of due process as cruel and unusual yet still be impermissible as failing to satisfy some other requirement of due process.

Putting to one side the question of arbitrary infliction of punishments (see In re Kemmler, 136 U. S. 436, 447 [1890]), all indications are that the only substantive limitation on punishments contained in the Federal Constitution is the Eighth Amendment proscription against cruel and unusual punishments. For example, in Weems v. United States, 217 U. S. 349, 372-373 (1910), the Supreme Court explained the adoption

of the Eighth Amendment as a necessary restriction on otherwise "unlimited" legislative power to inflict cruel punishments. Similarly, in referring to Federal legislation in Bell v. United States, 349 U. S. 81, 82 (1955), the court noted: "The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment." Most recently, in Furman v. Georgia, supra, at 263, Mr. Justice Brennan wrote that the prohibition against cruel and unusual punishments was included in the Bill of Rights "precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes."

That the due process clause does not substantively limit the severity of legislatively imposed punishments except in so far as they are cruel and unusual is evident from In re Kemmler, supra, at 448-449. In the Kemmler case, a sentence of death by electrocution imposed by the State of New York was challenged under the Fourteenth Amendment. As the law then stood, the Eighth Amendment proscription against cruel and unusual punishments had no application to the States, so the challenge was based instead on the due process clause. The court rejected the argument. While conceding that due process would forbid any arbitrary deprivation of life, liberty, or property, the court emphasized that the due process clause "was not designed to interfere with the power

of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order." Id. at 449.

As a matter of construction, it makes little sense to me to bypass consideration of the Eighth Amendment proscriptions in favor of the substantive due process analysis relied on in today's opinion by the Chief Justice in this case. The Eighth Amendment was designed specifically to circumscribe the power of the Legislatures to impose criminal punishments. Surely in interpreting the already broad provisions of a constitution we should favor the specific over the general, especially here where we are left only to ponder "the vague contours" of the due process clause. Adkins v. Children's Hosp. of D. C. 261 U. S. 525, 568 (1923) (Holmes, J., dissenting).

To pinpoint the defect of the O'Neal I approach, let us consider a case arising under the Fourth Amendment to the United States Constitution. The police, having probable cause, obtain an arrest warrant, and proceed to enter a dwelling to effectuate an arrest. All Fourth Amendment requirements have been satisfied. See Commonwealth v. Forde, Mass. , - (1975).[1] However, it appears that the right of privacy is considered a fundamental interest protected by the due process clause. Roe v. Wade, 410 U. S.

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[1] Mass. Adv. Sh. (1975) 1625, 1634-1637.

113, 152-153 (1973). Is the result of O'Neal I that we must further determine whether the arrest in a dwelling with a warrant is the least restrictive means toward furtherance of a compelling governmental end? For example, it may well be that there is no particular emergency requiring quick action by the police. The arrest may be safely made at some later time outside the dwelling where the invasion of privacy is minimized.

Furthermore, by characterizing life as a fundamental interest, today's opinion by the Chief Justice not only tests the death penalty against the general language of the due process clause but also requires that the court undertake "strict scrutiny" of the Commonwealth's justification for the death penalty. Without traversing the enormity of the decision to extinguish the life of a human being, no matter what the crime, I am disturbed by the implications of this requirement. I might first point out that no cases are cited in the opinion in which the United States Supreme Court or any other court has found life to be a fundamental interest within the meaning of the due process or equal protection clauses for the purpose of exercising strict scrutiny over governmental decisions affecting the interest in life. This characterization is critical, for once it has been made, the consequence is "the abandonment of the otherwise proper restraint on judicial review." Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065, 1131 (1969).

Indeed, the very dogmatic and mechanical nature of the analysis occasioned by the mere dubbing of an interest as fundamental has come under mounting criticism in recent years. See Dunn v. Blumstein, 405 U. S. 330, 363-364 (1972) (Burger, C.J., dissenting); San Antonio Independent Sch. Dist. v. Rodriguez, 411 U. S. 1, 98-110 (1973) (Marshall, J., dissenting); Goodpaster, The Constitution and Fundamental Rights, 15 Ariz. L. Rev. 479, 498-499 (1973). Without doubt there is a basic, personal right to life secured by the United States and Massachusetts Constitutions; but recognition of this right does not require that the constitutionality of capital punishment for the crime of rape-murder be tested by the wooden and largely conclusory standards of "compelling state interest" and "least restrictive means."

A further difficulty with the two step analysis is discoverable in the following question: If "life" is a fundamental interest under the Constitution, why is not "liberty" also a fundamental interest? Certainly liberty is explicitly guaranteed by the Constitution to the same extent that life is explicitly guaranteed. See San Antonio Independent Sch. Dist. v. Rodriguez, supra, at 33-34. I agree with Mr. Justice Powell that "[t]he Due Process Clause admits of no distinction between the deprivation of 'life' and the deprivation of 'liberty.'" Furman v. Georgia, 408 U. S.

238, 447 (1972) (dissenting opinion). Perhaps the most telling illustration of this point lies in the two cases cited in the Chief Justice's opinion in O'Neal I for the proposition that life is a fundamental interest. Mass. at [9] In both Yick Wo v. Hopkins, 118 U. S. 356, 370 (1886), and Johnson v. Zerbst, 304 U. S. 458, 462 (1938), the phrase employed by the court referred to the fundamental rights of life and liberty. It may be argued of course that nothing is so fundamental as the right to life, that it is an interest on another plane altogether. But in my view the interest in not serving the remainder of one's life in prison is also enormously significant and could just as well be deemed "fundamental" for the purpose of triggering strict scrutiny. Yet are we then to invoke the less restrictive alternative test for a sentence of life imprisonment, and, if so, what about a twenty-year sentence, and so on down the line? Also, what if the government is never able to adduce convincing proof that any punishment is a necessary means to a compelling State interest — does it then lack the power to punish at all? See Furman v. Georgia, supra, at 396 (Burger, C.J., dissenting).

The problematic nature of the analysis proposed in O'Neal I demonstrates to me the dangers inherent in the

[9] Mass. Adv. Sh. (1975) at 1099.

court's apparent willingness to invite yet one more avenue of attack against the State's criminal laws under the banner of substantive due process. The constitutional theory proposed is most reminiscent of the era of Lochner v. New York, 198 U. S. 45 (1905), when statutes were thought to be violative of due process merely because they were considered unwise, that is, offensive to the judge's "personal preferences." Hand, The Bill of Rights 70 (1958). See Lochner v. New York, supra, at 74-76 (Holmes, J., dissenting); Adkins v. Children's Hosp. of D. C. 261 U. S. 525, 568-570 (1923) (Holmes, J., dissenting); Williamson v. Lee Optical of Okla. Inc. 348 U. S. 483, 488 (1955); Ferguson v. Skrupa, 372 U. S. 726, 730 (1963); Dandridge v. Williams, 397 U. S. 471, 484 (1970); McGautha v. California, 402 U. S. 183, 254-255, n. 4 (1971) (Brennan, J., dissenting). As in the Lochner line of cases, judicial intervention here under the due process clause involves the court in difficult factual determinations, in this case requiring the court to make an empirical judgment about the efficacy of the death penalty as compared to life sentences in serving the various goals of the criminal law. Yet this is a subject matter most appropriate for the careful study and open debate of the legislative body. As Mr. Justice Frankfurter

wrote in another context, "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy." Gore v. United States, 357 U. S. 386, 393 (1958).

Furthermore, the substantive due process analysis here actually goes well beyond the theory of judicial intervention employed in the Lochner line of cases, for not even in those decisions did the court purport to shift the burden of proof on the validity of statutes to the Legislature. See Lochner v. New York, supra, at 56-58; Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920, 940-941 (1973). Apparently the concept of judicial restraint in striking down State legislation is now to evaporate when the challenge can be fitted into the mold of substantive due process, and I fear we have not seen the last of this tantalizing device. We would do well to heed the words of Mr. Justice Holmes, who was the first to recognize that the Lochner approach

was fraught with danger: "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." Baldwin v. Missouri, 281 U. S. 586, 595 (1930) (dissenting opinion).

My concern for a proper measure of judicial restraint applies of course to our consideration of the Eighth Amendment challenge as well, and I shall return to this theme in that context. But I believe it is of particular moment in the area of the due process clause, providing a further reason, if one is needed, for questioning the analysis undertaken by the Chief Justice in this case and for avoiding its consequences.

It remains only to add on this point that while other language in our State Constitution is somewhat different (see arts. 10 and 12 of the Declaration of Rights) in its provisions for due process from those of the Federal Constitution, in Pugliese v. Commonwealth, 335 Mass. 471, 474-475 (1957), we construed the language to mean practically the same thing as that of the due process clause of the Fourteenth Amendment. There were in essence no differences between the Federal and the State Constitutions. I reiterate that the substantive due process approach of O'Neal II to the State Constitution relies almost entirely on Federal precedents dealing with the Fourteenth Amendment. My references to due process apply equally to both Constitutions.

3. Cruel and Unusual Punishments.

I now turn to what seems to me to be the real issue in the case, namely, the proscription of cruel and unusual punishments in the Eighth Amendment of the United States Constitution, and of cruel or unusual punishments in art. 26 of the Constitution of the Commonwealth.

The defendant argues that both Constitutions strike down the death penalty as cruel and unusual or cruel or unusual. Initially I see no difficulty with the use of

"and" and "or." While in Gaynor's Case, 217 Mass. 86, 89-90 (1914), we referred to the word "or" as a disjunctive particle rather than a conjunctive particle, we noted in the same case that "or" is often construed as "and."

While this court has never before focused specifically on the meaning of "or" in art. 26, it has used the phrase "cruel and unusual" interchangeably with "cruel or unusual." Compare Sturtevant v. Commonwealth, 158 Mass. 598, 600 (1893), McDonald v. Commonwealth, 173 Mass. 322, 328 (1899), and Harding v. Commonwealth, 283 Mass. 369, 374 (1933), with Commonwealth v. Hitchings, 5 Gray 482, 486 (1855), Commonwealth v. Murphy, 165 Mass. 66, 69 (1895), and Commonwealth v. Novak, 272 Mass. 113, 116 (1930). In addition, although Chief Justice Holmes initially reserved judgment on the question in Storti v. Commonwealth, 178 Mass. 549 (1901), he noted in dicta that "[n]ot only is the prohibition addressed to what in a proper sense may be called the punishment but, further, the word 'unusual' must be construed with the word 'cruel' and cannot be taken so broadly as to prohibit every humane improvement not previously known in Massachusetts." Id. at 553. In the absence of historical evidence suggesting that the framers meant to proscribe every new form of punishment,

regardless of its nature, or every form of punishment which might be characterized as "cruel" without regard to its ordinariness, I believe Chief Justice Holmes's reading of the two adjectives together is the only sensible construction of the phrase.

With reference to People v. Anderson, 6 Cal. 3d 628, (1972), cert. den. 406 U. S. 958 (1972), in which the California Supreme Court held the death penalty unconstitutional under a California provision prohibiting "cruel or unusual" punishment, that court emphasized the fact that the disjunctive established independent tests for cruelty and unusualness. I am not persuaded by this California precedent, particularly in light of the fact that the decision did not in fact turn on the independence of the standards, since the court found the death penalty to be both cruel and unusual.

Furthermore, there is nothing in our case law which suggests that art. 26 imposes a more rigorous limitation on punishments than the Eighth Amendment. Indeed, if anything, art. 26 imposes less restriction on possible punishments. The early cases read art. 26 as applying only to action by the courts and not inhibiting the Legislature. Commonwealth v. Hitchings, supra. Sturtevant

v. Commonwealth, supra. While later we recognized that the Legislature is not unlimited by this provision, McDonald v. Commonwealth, supra, it has been accorded great deference even where penalties could fairly be characterized as Draconian or excessive, e.g., Harding v. Commonwealth, supra, Commonwealth v. Moore, 359 Mass. 509 (1971).

Thus I conclude that for purposes of this analysis art. 26 of the Massachusetts Declaration of Rights imposes a standard no more restrictive than that expressed in the prohibition of "cruel and unusual" punishment in the Eighth Amendment.

The question whether the death penalty constitutes "cruel and unusual" punishment within the meaning of the Eighth Amendment was recently and exhaustively discussed in Furman v. Georgia, 408 U. S. 238 (1972). In a per curiam decision, the court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments" (emphasis supplied). Id. at 239-240. Each of the five judges supporting the decision, and each of the four dissenting from it, filed a separate opinion. Such elaborate scrutiny, however, while serving

to air thoroughly the arguments on both sides of the issue, left unclear the precise extent of the decision, another reason for awaiting the outcome of the Fowler case. A reading of the per curiam decision and of the supporting opinions leads to the conclusion that Furman v. Georgia does not prohibit the imposition of the death penalty in cases where the Legislature has prescribed a mandatory death sentence for murder.

In the three cases involved in the Furman case, the determination whether the penalty should be death or a less severe punishment was left by the statute to the discretion of the judge or of the jury.

Mr. Justice Douglas, writing in support of the decision, focused almost exclusively on the discretionary aspect of the State statutes in question, concluding that "these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." Id. at 256-257.

Mr. Justice Stewart rested his conclusion that the death penalty in the cases before the court was "cruel and unusual" at least in part on the discretionary aspect of

the sentencing procedure. "For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." Id. at 309-310.

Finally, Mr. Justice White pointed out that the "facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us," Id. at 310, and concurred in the judgment of the court because "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Id. at 313.

Thus, three of the five majority Justices expressly limited the decision to discretionary imposition of the death sentence by judge or jury, and refused to consider whether a mandatory death sentence would vitiate the Eighth Amendment.

Furthermore, as Mr. Justice Blackmun pointed out in his dissent, "The several concurring opinions acknowledge,

as they must, that until today capital punishment was accepted and assumed as not unconstitutional per se under the Eighth Amendment or the Fourteenth Amendment. This is either the flat or the implicit holding of a unanimous Court in Wilkerson v. Utah, 99 U. S. 130, 134-135, in 1879; of a unanimous Court in In re Kemmler, 136 U. S. 436, 447, in 1890; of the Court in Weems v. United States, 217 U. S. 349, in 1910; of all those members of the Court, a majority, who addressed the issue in Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, 463-464, 471-472, in 1947; of Mr. Chief Justice Warren, speaking for himself and three others (Justices Black, DOUGLAS, and Whittaker) in Trop v. Dulles, 356 U. S. 86, 99, in 1958; in the denial of certiorari in Rudolph v. Alabama, 375 U. S. 889, in 1963 (where, however, JUSTICES DOUGLAS, BRENNAN, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had 'neither taken nor endangered human life'); and of Mr. Justice Black in McGautha v. California, 402 U. S. 183, 226, decided only last Term on May 3, 1971." Id. at 407-408.

General Laws c. 265, § 2, provides that the death penalty is mandatory for any person found guilty of murder in the first degree committed in connection with the

commission of rape or attempted rape. Thus all those found guilty of this combination of crimes will be subjected to the same penalty.

The sheer infrequency of imposition of the death penalty, referred to by several of the opinions in the Furman case, will not be decreased. However, the essence of the complaint of infrequency was that it raised a presumption of arbitrariness in the imposition of the penalty. Where, as here, the Legislature has made a judgment that all found guilty of a particular class of crime must be punished by death, such objection cannot be raised.

Thus Furman v. Georgia does not decide the question before us in this case, and I turn now to consider whether the Eighth Amendment prohibits the imposition of a mandatory death sentence for murder committed in the course of a rape.

On purely historical grounds, there are strong arguments for finding that the death penalty is not "cruel and unusual" punishment within the meaning of the Eighth Amendment. As was noted by four judges in Trop v. Dulles, 356 U. S. 86, 99 (1958), "[T]he death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the

constitutional concept of cruelty." Evidence internal to the Constitution such as the Eighth and Fourteenth Amendment guaranties against deprivation of life without due process suggests that the framers never contemplated that the death penalty per se was a cruel and unusual punishment. It seems without doubt that the framers of the Eighth Amendment (and of the Massachusetts Constitution as well) had as their principal intention the elimination of the tortures of the Stuart regime in England. In all the elaborate literature dealing with this subject, which has received extensive treatment in Furman v. Georgia, supra, and People v. Anderson, supra, there is no evidence on the drafting of our fundamental documents which discloses any intention to open the way for the abolition of capital punishment. I do not venture into a repetition of the basic sources of this statement. The Furman and Anderson cases treat them quite completely. Argument that capital punishment was cruel and unusual punishment in the eyes of the constitutional fathers cannot be supported.

As Mr. Justice Black noted in a separate opinion in McGautha v. California, 402 U. S. 183, 226 (1971), "The Eighth Amendment forbids 'cruel and unusual punishments.'

In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment. Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power."

Even if we move beyond purely historical considerations, and recognize that clauses such as "cruel and unusual" draw their meaning "from the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, supra, at 101, it is far from clear what those standards of decency are, or that the mandatory imposition of the death penalty in a case such as this violates them. When such a standard is uprooted from its historical origins, and where there is little indication, either from the language itself or in the circumstances of its enactment, what the content of those words should be now, the temptation is great for a court simply to use a vague standard as a vehicle for its own moral values.

We must be ever reluctant to overturn a decision by the popular branch of the government to impose a particular punishment in the absence of strong evidence that the Legislature has overstepped the constitutional limit. As Mr. Chief Justice Burger said, dissenting in the Furman case, "There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but, of all our fundamental guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms. . . . [I]t is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law." Furman v. Georgia, supra, at 375-376.

It seems clear that one meaning which may be attributed to the phrase "cruel and unusual" is that no illegal punishments be imposed, i.e., none that is not authorized by statute. There is some evidence that "unusual" had no meaning except as "illegal" in this context, and that it was the unauthorized punishments of Titus Oates during the reign of James II which were in the framers' minds. There is, of course, no question in this case along this line since the Legislature has clearly authorized this punishment.

"Cruel and unusual" may be taken to mean that a punishment not be grossly disproportionate to the offense. Thus in Weems v. United States, 217 U. S. 349, 367 (1910), the court interpreted the Eighth Amendment as requiring as "a precept of justice that punishment for crime should be graduated and proportioned to offense," and held that a punishment of a fine, plus twelve years in jail, involving wearing of chains, and deprivation of civil rights during that time, followed by perpetual disqualification from political rights, and subjection to surveillance, all for a crime of making false entries in public records, was unconstitutional. While adoption of this precept does not necessarily mean we on the other hand wholeheartedly indorse a hard eye-for-an-eye, or as here, life-for-a-life, morality, it is at least true that the death penalty is not grossly disproportionate to the crime of murder committed in the course of a rape.

It has also been said that a punishment must not be excessively painful, unnecessarily painful, or demeaning to human dignity. Presumably it is these considerations which lie behind our intuitive rejection of torture, burning at the stake, and drawing and quartering, as "cruel and unusual." Thus in Louisiana ex rel. Francis v. Resweber, 329 U. S.

459 (1947), the court denied relief against a second execution after the first execution failed to cause the defendant's death presumably because of a mechanical difficulty. The court noted, "There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution." Id. at 464. It has been argued that the death penalty in this case is unnecessarily cruel because life imprisonment could achieve the same goals. This argument, however, requires not only that we refuse to allow retribution as a justifiable social purpose in punishment of murderers, but also that we deny that the death penalty has a greater deterrent effect. The evidence such as there is on this point appears inconclusive but we do not see that fact as enabling us to substitute our judgment on it for that of the Legislature.

Another factor which may be taken into account in assessing the meaning of "cruel and unusual" is whether there is external evidence that in fact a punishment does not meet contemporary standards of decency. Thus, in Trop v. Dulles, 356 U. S. at 102, in ruling that loss of citizenship for desertion from the armed forces was cruel and unusual, the court noted that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as

punishment for crime." There is nothing even approaching virtual unanimity of opinion in opposition to the death penalty. While we may take judicial notice of the fact that the death penalty has not been carried out in Massachusetts since 1947, we may also take judicial notice of the fact that in 1968, at the general election, when presented with the question, "Shall the commonwealth of Massachusetts retain the death penalty for crime?" a substantial majority of those expressing an opinion voted in favor of retaining the death penalty.✓ While there are many reasons why such an advisory vote might not be taken as the definitive expression of opinion on this topic, it is at least sufficient to show that public opinion is deeply divided.

4. Conclusion.

In sum, it is my conclusion that the due process analysis contained in O'Neal I and O'Neal II is unsound and could be the genesis of great and unwarranted constitutional difficulty. It is further my conclusion that, notwithstanding the treatises for and against, mostly

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✓The total number of ballots cast was 2,348,005. Of these 1,159,348 voted, "Yes," 730,649 voted, "No," and 458,008 were blank. Election Statistics, Pub. Doc. No. 43, 1968, p. 406.

against, capital punishment cited in the Chief Justice's opinion, the death penalty is not cruel and unusual punishment in the constitutional sense. It is further my conclusion that this court is compelled by art. 30 of the Declaration of Rights of Massachusetts to remain away from the determination of questions which are legislative and not judicial. I conclude that the death penalty is not prohibited in this case by the Eighth Amendment or the Declaration of Rights. I would also conclude that the provision of G. L. c. 265, § 2, which mandates the death penalty for murder committed in connection with the commission of rape or an attempt to commit rape is not unconstitutional, and that sentences imposed under that provision are valid. I reiterate that the dubious constitutional consequences of today's opinion by the Chief Justice could be avoided without prejudice to the Commonwealth were we to await the outcome of North Carolina v. Fowler, 285 N. C. 90 (1974), cert. granted 419 U. S. 963 (1974), set for reargument U. S. (1975).[1]

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[1] (June 23, 1975) 43 U. S. L. Week 3674.

Appendix E

Pp. 72-78 of the Petition for Writ of Certiorari in Hallman v. Florida, No. 74-6168 (filed March 11, 1975)

the accused of a jury that is "truly representative of the community," Smith v. Texas, supra; see Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970) -- is violative of petitioner's right to equal protection and due process.

c. The Exclusion of a Venireman with Conscientious Scruples Against Capital Punishment Deprived Petitioner of his Sixth Amendment Right to a Representative Jury.

This case also presents the significant constitutional question whether any death qualification of a jury is permissible in the wake of the incorporation of the Sixth Amendment's jury-trial guarantee into the Fourteenth. The Witherspoon decision was handed down only a few days after Duncan v. Louisiana, 391 U.S. 145 (1968); Witherspoon's trial, of course, long pre-dated Duncan; and the cases in which the Court has since applied Witherspoon have all been pre-Duncan cases or cases in which no Sixth Amendment challenge to the practice of death qualification was made. See Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); and the twenty-three cases reversed on authority of Witherspoon in 403 U.S. at 946-948 (1971). Prior to the effective date of Duncan (see DeStefano v. Woods, 392 U.S. 631 (1968)), the only federal constitutional rights enjoyed by a state criminal defendant in connection with the selection of his trial jury were those vouchsafed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court had then recognized the obligation of the States not to exclude racial minority groups from the petit jury, see Smith v. Texas, 311 U.S. 128 (1940);

Hernandez v. Texas, 347 U.S. 475 (1954), but had not yet imposed upon state criminal trials the more exacting obligations of the Sixth Amendment. Compare Hoyt v. Florida, 368 U.S. 57 (1961), with Taylor v. Louisiana, 43 U.S.L.W. 4167 (U.S., Jan. 21, 1975).

Since Duncan, however, the Court has recognized that the Sixth Amendment guarantee of jury trial entitles a state criminal defendant to "a petit jury [drawn] from a representative cross section of the community." Taylor v. Louisiana, supra, 43 U.S.L.W. at 4169. In Taylor -- which marks only the latest exemplification of this principle[66/] -- the Court held that a male criminal

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66/ Between the dates of Duncan and Taylor, the Court clearly said several times that the selection of petit jurors from a representative cross section of the community was an essential requirement of the Sixth Amendment. In Carter v. Greene County Jury Commission, 396 U.S. 320, 330 (1970), the Court suggested that such a requirement was imposed upon the States by Duncan, stating that the "very idea of a jury" was that of a "'body truly representative of the community'" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) and that jury lists must "'reasonably reflect a cross-section of the population,'" 396 U.S. at 332 (quoting Brown v. Allen, 344 U.S. 443, 474 (1953)). See also Williams v. Florida, 399 U.S. 78, 100 (1970); Apodaca v. Oregon, 406 U.S. 404, 410 (1972); and see Peters v. Kiff, 407 U.S. 493, 502-504 (1972) (opinion of Mr. Justice Marshall).

defendant had standing to contest the exclusion of women from his trial jury without the necessity of demonstrating any specific prejudice because the exclusion of a distinctive population group "deprived him of the kind of fact finder to which he was constitutionally entitled." Id. at 4168. 67/

67/ "We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . . The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

Taylor v. Louisiana, supra, 43 U.S.L.W. at 4170.

As the Court has progressively clarified the nature of the "jury" guaranteed in state criminal proceedings by the Sixth Amendment, the cross section requirement has become increasingly essential and the permissibility of death qualification has therefore become increasingly suspect. Williams v. Florida, 399 U.S. 78 (1970), held that a jury of twelve was not an indispensable part of the Sixth Amendment right: all the Sixth Amendment required was that the jury be large enough "to provide a fair possibility for obtaining a representative cross-section of the community . . . " Id. at 100. This was so because the critical function of the jury was to provide a citizen group, representative of the community, which would serve to check possible Government oppression of criminal defendants. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." Ibid. In Apodaca v. Oregon, 406 U.S. 404, 410 (1972), the Court similarly ruled that the Sixth Amendment did not require conviction by unanimous verdict in State criminal cases, since the jury's function could be served without unanimity "as long as it consists of a group of laymen representative of a cross section of the community."

The principle that no identifiable group may be systematically excluded from jury panels is not limited to groups defined by race, of course. See Taylor v. Louisiana, supra;

White v. Crook, 251 F. Supp. 401, 408-409 (M.D. Ala. 1966) (exclusion of women); Labat v. Bennett, 365 F.2d 698 (CA5 1966), cert. denied, 386 U.S. 991 (1967) (exclusion of wage earners); State v. Schowgurow, 240 Md. 121, 213 A.2d 475 (1965) (exclusion of agnostics and atheists).

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Hernandez v. Texas, 347 U.S. 475, 478 (1954). As the Court reiterated in Apodaca v. Oregon, supra, 406 U.S. at 413, the Sixth Amendment forbids "systematic exclusion of identifiable segments of the community from jury panels," because all groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined." And the Court plainly recognized in Witherspoon that jurors with scruples against the imposition of the death penalty form a distinctive, coherent and sizeable group in most communities from which juries are selected.[68/]

68/ See also, e.g., Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. COL. L. REV. 1 (1970); Vidmar & Ellsworth, Public Opinion and the Death Penalty, 26 STAN. L. REV. 1245 (1974).

Since a venireman was excluded from petitioner's post-Duncan trial jury on the sole ground of her conscientious scruples against the death penalty, the issue is presented here whether such an exclusion may be justified under the exacting standards of the Sixth Amendment. Admittedly, a defendant cannot object under the Sixth Amendment to the exclusion for cause of veniremen who are related to him or who have a monetary interest in the outcome of his suit, because of the danger that such veniremen, if selected as jurors, would bring to the jury's deliberations attitudes that are inconsistent with their proper duty as jurors to determine the truth impartially. Under a statutory scheme like Florida's,however, it is the rightful duty of the jury to express community attitudes about punishment: "one of the most important functions any jury can perform [in the administration of such a statute] . . . . is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra, at 520 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). Indeed, the Florida capital punishment statute implicitly contemplates the expression of a broad range of community sentiment regarding punishment, since it provides for a recommendation of sentence by a "majority of the jury," Fla. Stat. §921.141(3), and allows the trial judge to overrule this "recommendation," ibid. It would thus have been impossible for Venireman Miller to have "hung" the jury on the issue of sentence (assuming even that she

adamantly refused to vote in favor of the death sentence -- an assumption not justified by the voir dire record, see pp. 61-67, supra); and the vote of a majority of the jury to recommend life imprisonment would itself not have precluded the trial judge's imposition of a death sentence.[69/] The Court should determine, therefore, whether in this setting a criminal defendant is entitled by the Sixth Amendment to a jury panel which reflects a fair cross section of community sentiment -- a panel from which veniremen such as Mrs. Miller cannot be excluded for cause simply on account of their views regarding capital punishment.

69/ Jury recommendations of mercy have not forestalled the imposition of the death sentence in at least 16 cases. See note 13, supra.